Supreme Court, U.S.
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No. 04-____

IN THE

Supreme Court of the United States

VLADIMIR RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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February 23, 2005

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the imposition, prior to *United States v. Booker*, 125 S. Ct. 738 (2005), of a sentence under the United States Sentencing Guidelines that exceeded the maximum sentence supported by the facts found by the jury or admitted by the defendant may presumptively be corrected on review for plain error, or whether such an unconstitutional sentence is reversible plain error only in the rare case in which there is affirmative evidence, such as a statement by the trial court, that the court would have imposed a lighter sentence if not bound by the Guidelines.

PARTIES TO THE PROCEEDINGS

The parties to the proceeding below are contained in the caption of the case.

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INTRODUCTION

Last Term, in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), this Court held that under the State of Washington's mandatory sentencing guidelines system, it violated the Sixth Amendment to impose a sentence above the maximum guidelines sentence supported by the facts found by the jury or admitted by the defendant. In *United States v. Booker*, 125 S. Ct. 738 (2005), this Court extended that holding to the United States Sentencing Guidelines. The Court noted that its decision in *Booker* was applicable to all cases on direct review, and expressly recognized that "prudential doctrines," such as "the 'plain-error' test," would play an important role in applying it to such cases. *Id.* at 769. Barely one month after that decision, the Circuits have fallen into a sharp three-way conflict in applying that mandate. The Third, Fourth, Sixth, and Ninth Circuits have followed a rule under which a sentence longer than the maximum Guidelines sentence justified by the facts found by the jury or admitted by the defendant almost always constitutes plain error requiring resentencing. The First and Eleventh Circuits have adopted a rule under which such sentences almost never constitute plain error. And the Second Circuit has adopted a third approach: remanding in every case to ask the district court to make the plain error determination.

This conflict affects a massive number of cases, and concerns an important issue that is squarely and cleanly presented here. Accordingly, petitioner submits that this Court's review is warranted.

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is not yet reported in the *Federal Reporter*, but is available at 2005 WL 272952.

JURISDICTION

The court of appeals entered judgment on February 4, 2005. Jurisdiction in this Court exists under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND GUIDELINES PROVISIONS INVOLVED

The relevant constitutional, statutory, and Sentencing Guidelines provisions involved are set forth in an appendix to the petition at pages 27a-33a.

STATEMENT OF THE CASE

A. The district court proceedings

Petitioner was convicted by a jury in the Middle District of Florida of conspiring to distribute and to possess with intent to distribute, and with possessing with intent to distribute, "a detectable amount" of 3,4-methylenedioxy-methamphetamine, also known as MDMA or Ecstasy, in violation of 21 U.S.C. §§ 846 and 841(b)(1)(C), and 18 U.S.C. § 2. No specific quantity of MDMA was alleged in the indictment, and the jury was not asked to make any determination as to quantity.

At sentencing, on May 10, 2004, the parties contested the quantity of MDMA for which petitioner was responsible under the United States Sentencing Guidelines. Petitioner admitted involvement in transporting 2,000 MDMA pills from Miami to Tampa, and contended that he was responsible only for that amount, or, at a maximum, for the 3,050 MDMA pills introduced into evidence at trial. The Government contended that he was responsible for approximately 30,000 pills. The only evidence supporting the Government's contention was the trial testimony of a narcotics dealer who had continued to sell drugs while purporting to cooperate with the Government, and who the Government conceded at trial was "notorious," "a thief," and

"a confidential informant who went bad."[1] Dec. 10, 2003 Trial Tr., at 136. Nonetheless, and despite polygraph evidence supporting petitioner's position, the district court credited the testimony of the cooperator and found, by a preponderance of the evidence, that petitioner was responsible for 30,000 MDMA pills.

Based on this judge-made finding, the district court determined that petitioner's offense level under the Sentencing Guidelines was 30, which, coupled with petitioner's lack of any prior criminal record, produced a sentencing range under the Guidelines of 97 to 121 months. *See* Pet. App. 10a & n.4. Had petitioner been held responsible for only the 2,000 pills he admitted transporting, or even the 3,050 pills in evidence at trial, his offense level would have been 26, and the accompanying range would have been 63 to 78 months. The district judge sentenced petitioner to 109 months' imprisonment, observing that he was selecting "the middle of the guideline range." May 10, 2004 Sentencing Tr., at 50.

B. The court of appeals' decision

On June 24, 2004, after the filing of petitioner's notice of appeal, this Court issued its decision in *Blakely v. Washington*, 124 S. Ct. 2531, striking down the State of Washington's mandatory sentencing guidelines system under the principles of *Apprendi v. New Jersey*, 530 U.S. 466 (2000).

On appeal, petitioner argued that his sentence should be reversed, because (1) the district court had clearly erred in crediting the informant's testimony and concluding that petitioner was accountable for 30,000 MDMA pills; and (2) under *Blakely* and *United States v. Cotton*, 535 U.S. 625 (2002), the district judge had plainly erred in sentencing him

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[1] The cooperating witness testified that petitioner had made "10, 12, 13" trips transporting MDMA. The sole corroborating witness, another cooperator, testified to three or four such trips.

to a term of imprisonment longer than the maximum sentence that could be justified under the Sentencing Guidelines based on the facts alleged in the indictment and found by the jury or admitted by petitioner.[2] Petitioner noted that using the drug quantity to which he admitted, his Guidelines sentencing range would have produced a maximum sentence of 78 months, more than two-and-a-half years shorter than the sentence he received.

On January 12, 2005, this Court issued its opinion in *United States v. Booker*, 125 S. Ct. 738, extending the holding of *Blakely* to the federal Sentencing Guidelines. The court of appeals subsequently ordered supplemental briefing addressing whether, in light of *Booker*, the sentence imposed by the district court constituted plain error. In that supplemental briefing, petitioner argued that the increase in his sentence resulting from the district court's drug quantity findings was plain error, relying principally on *United States v. Hughes*, 396 F.3d 374 (4th Cir. 2005), the first published court of appeals decision addressing whether *Booker* error was plain error.

On February 4, 2005, the Eleventh Circuit issued an opinion affirming petitioner's sentence. The court began by upholding the district judge's factual determination that petitioner was responsible for approximately 30,000 MDMA pills. While acknowledging that there were several reasons to doubt the credibility of the informant whose testimony provided the basis for the enhanced drug quantity, Pet. App. 10a, the court of appeals ruled that the district court's credibility determination was not clearly erroneous,

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[2] Recognizing that the Eleventh Circuit had held, prior to the time petitioner's initial brief was filed, that the Sentencing Guidelines were not unconstitutional under *Blakely* (*United States v. Reese*, 382 F.3d 1308 (11th Cir. 2004)) and that *Blakely* errors did not constitute plain error (*United States v. Duncan*, 381 F.3d 1070 (11th Cir. 2004)), petitioner raised the *Blakely* issue "pending the Supreme Court's determination of the applicability of *Blakely* to the federal guidelines."

reasoning that "[w]here the factfinding resolves a swearing match of witnesses, the resolution will almost never be clear error." Pet. App. 8a.

The court of appeals then addressed the challenge under *Blakely* and *Booker* and held that the imposition of a sentence above the maximum Guidelines sentence justified by the facts found by the jury or admitted by the defendant does not constitute plain error. The court recognized that "three other federal courts of appeals"—the Second, Fourth, and Sixth Circuits—"have reached results different from our own in regard to whether *Booker* error is plain error," but pronounced itself "unpersuaded" by the other courts' opinions. Pet. App. 17a. (Since the Eleventh Circuit's decision, three additional Circuits, the First, Third, and Ninth, have addressed the issue. As detailed below, the First Circuit aligned itself with the Eleventh, while the Third and Ninth Circuits have adopted an opposing view.)[3]

The court began its analysis by identifying *Booker*'s holding as that "the Sixth Amendment right to trial by jury is violated where *under a mandatory guidelines system* a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury." Pet. App. 11a (emphasis in original). Then, noting that petitioner had not raised the *Blakely* issue in the district court, the court of appeals set forth the familiar four-part test for plain error first described in *United States v. Olano*, 507 U.S. 725, 732 (1993): The appellant must show "'(1) error, (2) that is plain, and (3) that affects substantial rights," and, "'[i]f all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously

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[3] Two other circuits, the Eighth and Tenth, have decided to move directly to en banc consideration of the issue, without any initial panel ruling. *See United States v. Gonzalez-Huerta*, No. 04-2045 (10th Cir.) (to be argued Mar. 7, 2005); *United States v. Pirani*, No. 03-2871 (8th Cir.) (to be argued Mar. 9, 2005).

affects the fairness, integrity, or public reputation of judicial proceedings.'" Pet. App. 12a (quoting *Cotton*, 535 U.S. at 631).

The court observed that the first two prongs of the test were satisfied: There was error under *Booker* because petitioner's "base offense level, guidelines range, and sentence" were "enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by the jury," under a mandatory sentencing guidelines system; and the error was plain—even though not plain at the time of sentence—because "'it is enough that the error be plain at the time of appellate consideration.'" Pet. App. 12a-13a (quoting *Johnson v. United States*, 520 U.S. 461, 468 (1997)).

The court held that the third prong, however—which requires a showing that the error "affected substantial rights," *i.e.*, that in the absence of the error there would have been a "reasonable probability" of a different result, Pet. App. 13a—had not been met. The court reached this conclusion by redefining the "error" being analyzed. Because *Booker* allowed the Sentencing Guidelines to continue to apply in advisory fashion, the court of appeals reasoned, the error in pre-*Booker* sentencings "is not that there were . . . enhancements based on facts found by the judge that were not admitted by the defendant or established by the jury verdict," but rather only the use of such enhancements "in a mandatory guidelines system." Pet. App. 15a. Accordingly, the court of appeals stated, the proper inquiry in applying the third plain-error prong is "whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." Pet. App. 17a.

Observing that "we don't know" what would have happened if the district court had treated the Guidelines as merely advisory—the district judge "might have given

Rodriguez a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence," *id.*—the court concluded that it was bound by this Court's decision in *Jones v. United States*, 527 U.S. 373 (1999), to find no plain error. According to the court of appeals, *Jones* mandates that where it is "uncertain or indeterminate" what the result would have been in the absence of error, "the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." Pet. App. 17a (citing *Jones*, 527 U.S. at 394-95).

The court thus treated *Jones* as establishing a rule that where a reviewing court is unable to predict what result the district court would have reached in the absence of error, the error does not "affect substantial rights" within the meaning of the test for plain error. Stated another way, the court ruled that in the case of a Sixth Amendment violation under *Booker*, there can be no plain error except in the rare case in which the district court gave some affirmative indication that it would have imposed a lower sentence if not bound by the Guidelines.

Accordingly, the court held that petitioner had failed to satisfy the third prong of the plain error test, and affirmed the judgment of the district court.

REASONS FOR GRANTING THE PETITION

In concluding the remedial portion of its opinion in *United States v. Booker*, this Court expressed its expectation that in applying the holding of *Booker* to all cases on direct review, "reviewing courts [would] apply ordinary prudential doctrines," such as "whether the issue was raised below and whether it fails the 'plain-error' test." 125 S. Ct. at 769. Barely one month after that decision, the Circuits have fallen into a square and rapidly growing conflict in applying that mandate to the massive backlog of cases in the courts of appeals awaiting this Court's decision in *Booker*. One approach, followed by four Circuits, would find plain error in almost every case in which a defendant received a

sentence longer than the maximum Guidelines sentence justified by the facts found by the jury or admitted by the defendant. Another, articulated by two Circuits, including the court below, would adopt a rule under which such error can rarely constitute plain error. And a third approach, adopted by yet another Circuit, steers a middle course, remanding in every case to ask the district court to make the plain error determination.

This conflict affects an extraordinary number of cases, and concerns an important issue that is squarely and cleanly presented by this case. Accordingly, petitioner submits that this case merits plenary review by this Court.

I. THERE IS A CLEAR AND GROWING CONFLICT ON THE PROPER DISPOSITION OF CLAIMS OF PLAIN ERROR UNDER *BOOKER*

In the short time since this Court's decision in *Booker*, the Circuits have been thrown into conflict over the recurring question whether the imposition, under the pre-*Booker* mandatory Sentencing Guidelines regime, of a term of imprisonment longer than the maximum sentence authorized under the Sentencing Guidelines by the facts found by the jury or admitted by the defendant constitutes plain error requiring a remand for resentencing. The focal point of that conflict has been the third prong of the traditional plain error test—*i.e.*, whether *Blakely*/*Booker* error is deemed to have affected the defendant's "substantial rights." The Eleventh Circuit, recently joined by the First Circuit, has adopted a rule under which such errors will almost never result in resentencing; the Third, Fourth, Sixth, and Ninth Circuits have held that such errors will almost always result in resentencing; and the Second Circuit has held that the district court in each case must determine whether resentencing is appropriate.

In this case, the Eleventh Circuit, while recognizing that petitioner's sentence was "error" that was "plain" under

Booker, ruled that a defendant cannot establish an effect on substantial rights from such an error in the absence of affirmative evidence that the district judge, had he or she known that the Guidelines range was not binding, would have imposed a shorter sentence. Pet App. 17a, 19a, 22a. Without such evidence, the court reasoned, "[w]e just don't know" the effect of the error, and the defendant "has not met his [third-prong] burden of showing that his substantial rights have been affected." Pet. App. 17a. Because affirmative evidence of what the district court would have done if it had predicted that the Guidelines would be treated as advisory will almost never exist,[4] the Eleventh Circuit's ruling amounts to a virtual per se rule against resentencing in the case of *Booker* error.

Similarly, the First Circuit, expressly disagreeing with cases from other Circuits, *see United States v. Antonakopoulos*, No. 03-1384, slip op. at 20-21 (1st Cir. Feb. 22, 2005), *available at* http://www.ca1.uscourts.gov

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[4] This is particularly true with respect to sentences imposed before *Blakely*, because the law was settled in every circuit that the Sentencing Guidelines were constitutional. *See, e.g., United States v. Casas*, 356 F.3d 104, 127-28 (1st Cir.), *cert. denied*, 124 S. Ct. 2405 (2004); *United States v. Luciano*, 311 F.3d 146, 153 (2d Cir. 2002), *cert. denied*, 124 S. Ct. 1185 (2004); *United States v. Parmelee*, 319 F.3d 583, 591-92 (3d Cir. 2003); *United States v. Cannady*, 283 F.3d 641, 649 & n.7 (4th Cir.), *cert. denied*, 537 U.S. 936 (2002); *United States v. Floyd*, 343 F.3d 363, 372 (5th Cir. 2003), *cert. denied*, 124 S. Ct. 2190 (2004); *United States v. Tarwater*, 308 F.3d 494, 517 (6th Cir. 2002); *United States v. Merritt*, 361 F.3d 1005, 1015 (7th Cir. 2004), *vacated*, 2005 WL 124002 (U.S. Jan. 24, 2005); *United States v. Banks*, 340 F.3d 683, 684-85 (8th Cir. 2003); *United States v. Ochoa*, 311 F.3d 1133, 1134-36 (9th Cir. 2002); *United States v. Mendez-Zamora*, 296 F.3d 1013, 1020 (10th Cir.), *cert. denied*, 537 U.S. 1063 (2002); *United States v. Ortiz*, 318 F.3d 1030, 1039 (11th Cir. 2003); *United States v. Pettigrew*, 346 F.3d 1139, 1147 n.18 (D.C. Cir. 2003). Accordingly, district courts had no reason to address what sentence they might impose if the Guidelines were struck down. Even after *Blakely*, no Circuit anticipated the sentencing process set forth in the remedy portion of *Booker*.

/pdf.opinions/03-1384-01A.pdf/, has joined the Eleventh Circuit, holding that "the defendant must point to circumstances creating a reasonable probability that the district court would impose a different sentence more favorable to the defendant under the new 'advisory Guidelines' *Booker* regime." *Id.* at 11; *see also id.* at 25 (requiring an affirmative showing based on statement by district judge or other "facts of the case").

In contrast, four Circuits—the Third, Fourth, Sixth, and Ninth—have reached precisely the opposite conclusion. In *United States v. Hughes*, the Fourth Circuit ruled that the district court's imposition of a sentence above the Guidelines maximum justified by the facts found by a jury, without more, constituted reversible plain error, even where "[t]he record does not provide any indication of what sentence the district court would have imposed had it . . . treat[ed] the guidelines as merely advisory." 396 F.3d at 381 n.7. The court held that the third-prong "substantial rights" test was satisfied by the fact that the defendant's sentence was higher than the maximum Guidelines sentence justified by the facts found by the jury. *Id.* at 380 n.6.

Similarly, in *United States v. Ameline*, 2005 WL 350811 (9th Cir. Feb. 10, 2005), the Ninth Circuit ruled that "we have no doubt" that the "substantial rights" prong of the plain error test was satisfied by the imposition of a sentence that "exceeded the maximum sentence under the Guidelines that was supported by [the defendant's] admission" as to the quantity of drugs he conspired to distribute. *Id.* at *5. The Ninth Circuit observed that "it is the *truly* exceptional case that will not require remand for resentencing under the new advisory guideline regime." *Id.* at *6 (emphasis in original).

The Sixth Circuit, after an initial lack of clarity (*see United States v. Milan*, 2005 WL 309934, at *6 & n.3 (6th Cir. Feb. 10, 2005) (describing initial inconsistency)), has squarely aligned itself with the Fourth and Ninth Circuits. In *United States v. Milan*, the court expressly rejected the

respective approaches of the Second and Eleventh Circuits, 2005 WL 309934, at *6-*7, and found it "clear" that a sentence "longer than the maximum sentence authorized [under the Guidelines] by the facts [the defendant] admitted when he pled guilty" affects substantial rights within the meaning of the third plain-error prong. *Id.* at *5; *but cf. United States v. Barnett*, 2005 WL 357015, at *19-*20 (6th Cir. Feb. 16, 2005) (Boggs, C.J., concurring and dissenting) (advocating the approach adopted by the Eleventh Circuit in this case). And the Third Circuit, without detailed plain error reasoning, has broadly determined that cases raising *Booker* challenges should be remanded for resentencing, because such issues "are best determined by the District Court in the first instance." *United States v. Davis*, 2005 WL 334370, at *8 (3d Cir. Feb. 11, 2005); *see also, e.g., United States v. Tyree*, 2005 WL 375700, at *2 (3d Cir. Feb. 17, 2005) (unpublished decision).

Finally, the Second Circuit has adopted a third approach: asking the district court, in all instances, to determine whether the error at issue prejudiced the defendant. In *United States v. Crosby*, 2005 WL 240916 (2d Cir. Feb. 2, 2005), the Second Circuit ruled that the appropriate disposition "for pre-*Booker*/*Fanfan* sentences pending on direct review will be a remand to the district court, not for the purpose of a required resentencing, but only for the more limited purpose of permitting the sentencing judge to determine *whether* to resentence." *Id.* at *11 (emphasis in original).[5] The Second Circuit applied its holding both to claims involving plain error and to any involving contentions of harmless error, explaining that resentencing will be appropriate when the district court determines that "under the post-*Booker*/*Fanfan* regime ... the original sentence would have differed in a nontrivial manner from that

[5] The *Crosby* panel made clear that it had issued its ruling only after receiving "numerous suggestions and comments" from "other judges of this Court." 2005 WL 240916, at *2.

imposed," because that determination "will demonstrate that the error in imposing the original sentence was harmful and satisfies plain error analysis." *Id.* at *12.[6] Two days later, on February 4, 2005, the Second Circuit issued an order noting that *Crosby* "set[] forth the procedure that the court will normally follow" with respect to the numerous appeals held pending *Booker*. The court attached a list of more than 200 pending appeals to which *Crosby* appeared to apply, and asked counsel in each case to specify whether the "appellant seeks a remand for consideration of whether resentencing should occur in light of" *Booker* and *Crosby*. *In re: Special Order of Inquiry to Appellants Regarding Remand Pursuant to* United States v. Crosby (2d Cir. Feb. 4, 2005).

II. THE ISSUE IN CONFLICT IS STARKLY PRESENTED BY THE PRESENT CASE

This case presents an excellent vehicle for the Court to consider whether the Sixth Amendment error recognized by *Booker* should be corrected on appellate review for plain error. First, there is no doubt that petitioner's constitutional rights were violated under *Booker*. There was no jury finding of drug quantity, and petitioner admitted at sentencing to transporting only 2,000 MDMA pills, for

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[6] In this respect, the Second Circuit's legal analysis is arguably closer to that of the First and Eleventh Circuits than to that of the Fourth, Sixth and Ninth Circuits. The latter three Circuits have focused the third-prong inquiry on whether the defendant's sentence would have been shorter under the Sentencing Guidelines but for enhancements unconstitutionally based on judge-made findings. *See, e.g.*, *Hughes*, 396 F.3d at 380; *Ameline*, 2005 WL 350811, at *5. The First, Second, and Eleventh Circuits, in contrast, have focused on the remedial portion of this Court's decision in *Booker*, and have asked, not whether the defendant's Guidelines sentence would have been shorter in the absence of unconstitutional judge-made findings, but rather whether the sentence would have been shorter "if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." Pet. App. 17a; *see Crosby*, 2005 WL 240916, at *12; *Antonakopoulos*, slip op. at 19-21. The Third Circuit has not addressed this issue.

which he could have received a maximum sentence of 78 months. The sentencing judge determined, however, by a preponderance of the evidence, that petitioner had possessed some 30,000 pills. Under the mandatory Guidelines system in place prior to *Booker*, this fact resulted in a sentencing range of 97 to 121 months' imprisonment. The district court sentenced Petitioner to 109 months' imprisonment, the exact center of the range, or 31 months (approximately 40%) more than the maximum sentence for which petitioner was eligible based on the admitted quantity of MDMA. There is therefore no doubt that, as the court of appeals summarized, "there was *Booker* error" here because, "[u]nder a mandatory guidelines system, Rodriguez's sentence was enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by the jury." Pet. App. 12a-13a. It is also undisputed that that error was "plain," within the meaning of the second prong of the plain error test. *See id.* at 13a.

Nor, unlike in some other cases, is there a concern that the case might be decided on an alternative ground that would prevent the Court from addressing the issue presented here. In two previous cases, *Johnson* and *Cotton*, this Court declined to address whether a particular misallocation of responsibility to a judge, rather than the jury, affected substantial rights under the third prong of the Court's test for plain error. In both cases, this Court avoided resolving that issue by ruling that the respective defendants had failed to carry their burden under the fourth, discretionary prong of the plain-error test—*i.e.*, whether the error seriously affected the "fairness, integrity or public reputation of judicial proceedings"—because the evidence of guilt in those cases was "overwhelming" and "essentially uncontroverted." *See Cotton*, 535 U.S. at 633; *Johnson*, 520 U.S. at 470. Here, in contrast, the evidence that petitioner possessed 30,000 tablets of MDMA was hotly contested and far from conclusive; indeed, it rested exclusively on the testimony of a cooperating witness whose credibility the Government

conceded was questionable. *Under these circumstances*, there can be no contention that the evidence supporting petitioner's sentence enhancement was "overwhelming" or "essentially uncontroverted."

Accordingly, the legal issue that has divided the courts of appeals is squarely presented here.

III. THE QUESTION PRESENTED IS A RECURRING ISSUE OF SUBSTANTIAL IMPORTANCE

Review by the Court is also warranted because the question presented is an issue of fundamental importance in an extraordinarily large number of cases.

In the most recent year for which statistics are available, approximately 64,000 criminal defendants were sentenced under the Guidelines. *See* United States Sentencing Commission, *2002 Sourcebook of Federal Sentencing Statistics* (hereinafter *2002 Sourcebook*) tbl. 2. Although the number of defendants sentenced in violation of *Blakely* and *Booker* cannot be definitively ascertained, it is necessarily—given the fact that Guidelines enhancements play a role in the vast majority of federal sentences—a very large number. To be sure, the question presented here arises only where the defendant failed to make a proper objection before the district court, but that is undoubtedly the situation in a very substantial number of cases, given that, prior to *Blakely*, every federal court of appeals to consider the issue had upheld the Guidelines in the face of a challenge under *Apprendi*. *See supra* note 4.

The recent order of the Second Circuit following its decision in *Crosby* highlights the number of affected cases. Following this Court's decision in *Blakely*, the Second Circuit withheld issuance of the mandate in numerous otherwise-decided cases potentially presenting *Blakely* issues; now, following its ruling in *Crosby*, *see supra* pp. 10-11, the court of appeals has issued an order addressed to appellants in all such cases requesting that they indicate

whether the defendant seeks a remand for sentencing reconsideration in accordance with *Crosby*. *See In re: Special Order of Inquiry*, *supra*. That order identifies more than 200 potentially-affected criminal appeals (although some of those cases may present harmless-error rather than plain-error issues), even without including cases still pending before the court. Given that the Second Circuit accounts for only about three percent of all sentencing appeals, *see 2002 Sourcebook* tbl. 55, these cases constitute only a small proportion of all affected cases nationwide.

It is hardly surprising, then, that in the mere weeks that have elapsed since the decision in *Booker*, numerous courts of appeals have addressed (and divided over) the question presented here. In addition, two Circuits, the Eighth and Tenth, have underscored the significance and the recurring nature of the issue by scheduling en banc arguments to address it in the first instance, bypassing panel review entirely. *See United States v. Gonzalez-Huerta*, No. 04-2045 (10th Cir.) (argument scheduled for Mar. 7, 2005); *United States v. Pirani*, No. 03-2871 (8th Cir.) (argument scheduled for Mar. 9, 2005).

It goes without saying, moreover, that the right at issue here is of substantial importance, as evidenced by the extraordinary attention devoted by this Court in recent years to the fundamental question of the allocation of factfinding responsibility between judge and jury. *See, e.g.*, *United States v. Booker*; *Blakely v. Washington*; *Harris v. United States*, 536 U.S. 545 (2002); *Ring v. Arizona*, 536 U.S. 584 (2002); *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Jones v. United States*, 526 U.S. 227 (1999); *Almendarez-Torres v. United States*, 523 U.S. 224 (1998); *United States v. Gaudin*, 515 U.S. 506 (1995).

No less important than questions about the scope of the underlying right are questions concerning which defendants already sentenced in violation of that right are entitled to invoke the protections of this Court's decisions. Indeed, the

Court has repeatedly recognized the need to resolve how its decisions in this area apply to defendants sentenced before the decisions were issued. For example, after *Apprendi*, the Court agreed to decide whether and how a sentence based on facts not charged in the indictment was subject to plain error analysis on appellate review. See *United States v. Cotton*, 535 U.S. 625. Similarly, the Court rapidly intervened to clarify the scope of the plain error doctrine in cases affected by its ruling in *United States v. Gaudin* that, in false statements prosecutions, the issue of materiality must be decided by a jury instead of a judge. *See Johnson v. United States*, 520 U.S. 461; *see also Schriro v. Summerlin*, 124 S. Ct. 2519 (2004) (deciding whether *Ring* applies retroactively to convictions that were already final when *Ring* was decided). The Court's intervention is likewise needed here to determine whether defendants concededly sentenced in violation of *Booker* may obtain relief on appeal.

Indeed, given the revolution wrought by *Blakely* and *Booker*, and the resulting large number of *Booker* plain error claims facing the circuit courts, that need is substantially *more* pressing than it was in *Cotton*, which involved only the relatively rare cases in which the sentence arguably exceeded a federal *statutory* maximum (principally, a small subset of narcotics cases), or *Johnson*, which involved only those cases in which a court mistakenly failed to submit an element of the offense to the jury.

IV. THE DECISION OF THE COURT OF APPEALS IS INCORRECT

This Court's review is also warranted because the court of appeals misapplied this Court's plain error precedents, in several ways.

1. Most fundamentally, the court of appeals misapplied the standard this Court has defined for what constitutes an effect on "substantial rights." The court at first correctly described the third prong of the plain error test—specifically, that in the absence of the error there would have been a

"reasonable probability" of a different result, "which means a probability 'sufficient to undermine confidence in the outcome.'" Pet. App. 13a (quoting *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004)); *see also id.* (effect on substantial rights shown where error "'affected the outcome'" of the proceedings) (quoting *Cotton*, 535 U.S. at 632). The court then erred, however, by placing dispositive weight on this Court's 1999 decision in *Jones v. United States*, 527 U.S. 373, reading *Jones* as mandating that it rule against the defendant when the defendant is unable to show affirmatively that a lower sentence would have been *more likely* than a higher one. Pet. App. 17a. Specifically, the court of appeals ruled that where "[t]he record provides no reason to believe any result is *more likely* than the other"—where "[w]e just don't know" what sentence the district court would have imposed in the absence of the error—the third prong of the plain error test is not satisfied. *Id.* (emphasis added).

This approach, requiring that an appellant affirmatively demonstrate that the result *would have been* more favorable to him, was specifically rejected last Term in *Dominguez Benitez*. In that case, this Court emphasized that the third-prong "reasonable probability" test is "*not* the same as, and should not be confused with, a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." 124 S. Ct. at 2340 n.9 (emphasis added). Rather, the defendant need only show that the prospect of a different result is "'sufficient to undermine confidence in the outcome' of the proceeding." *Id.* at 2340 (quoting *Strickland v. Washington*, 466 U.S. 668, 694 (1984)).

In the case of a district court mistakenly treating the Sentencing Guidelines as mandatory, it is impossible to see how the error, in the typical case, might somehow *not* "undermine confidence in the outcome." *Booker* requires judges to follow a vastly different sentencing process, in which the Sentencing Guidelines, no longer binding, are

merely one of several factors the judge must consider; in which judges must independently consider the seven factors (plus sub-factors) set forth in 18 U.S.C. § 3553(a); in which the judge may consider factors not previously deemed relevant by the Guidelines; and in which the judge ultimately has discretion as to what sentence to impose, subject only to the statutory minimum and maximum and appellate review for "reasonableness." In light of this revolutionary change, there clearly cannot be "confidence" that the "outcome" of a pre-*Booker* sentencing would have been the same under both the pre-*Booker* and post-*Booker* regimes.

Indeed, the Eleventh Circuit's own reasoning illustrates this point. The court of appeals repeatedly emphasized that "we don't know" or "[w]e just don't know" what would have happened if petitioner had been sentenced under the post-*Booker* regime, that the judge "might have given [petitioner] a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence," and that "[t]he record provides no reason to believe any result is more likely than the other." Pet. App. 17a. Unless the third-prong standard is to be revised—contrary to *Dominguez Benitez*, 124 S. Ct. at 2340 n.9—to require a showing that the result *would* have been more favorable to the appellant in the absence of error, this complete uncertainty as to what sentence petitioner would have received in the absence of error is, at a minimum, "sufficient to undermine confidence," *id.* at 2340 (internal quotation marks omitted), in the sentence imposed on petitioner under a mandatory view of the Guidelines.

Nor is there anything in *Jones* to the contrary. In *Jones*, this Court rejected a defendant's claim that his jury was induced to unanimously recommend the death penalty by jury instructions that allegedly might have caused the jury to believe that a lack of unanimity would result in a sentence shorter than life in prison. 527 U.S. at 384-96. The Eleventh Circuit seized on the statement in *Jones* that "[w]here the effect of an alleged error is so uncertain, a defendant cannot

meet his burden of showing that the error actually affected his substantial rights," *id.* at 394-95, reading it as establishing a principle that evidentiary equipoise on the consequences of an error necessarily requires affirmance of the sentence. But *Jones* establishes no such thing. First, the quoted language was not necessary to the decision in *Jones*; the Court had already ruled that Jones' claim of error "falls short of satisfying even the first requirement of the plain-error doctrine, for we cannot see that any error occurred." *Id.* at 390. Moreover, *Jones* was *not* a case in which there was equipoise. The Court made clear that the alleged error likely had *no* effect, because any potential effect "was allayed by the District Court's admonition that the jury should not concern itself with the effect of [its] recommendation," and "[t]he jurors are presumed to have followed these instructions." *Id.* at 394. *Jones* thus was not a case in which the error at issue left the appellate court completely unable to predict the result in the absence of error; it was a case in which it was doubtful whether the alleged error had any effect on the result *at all*.[7]

Furthermore, any possibility that *Jones* should be read as requiring an appellant to show that the result would likely have been different in the absence of error is definitively refuted by *Dominguez Benitez*'s holding that the appellant need *not* show by a preponderance that things "would have been different," and its reaffirmation that the required showing is merely one that "undermine[s] confidence" in the outcome. 124 S. Ct. at 2340 & n.9 (internal quotation marks omitted). Indeed, if there were any doubt about this point, the resulting tension between *Jones* and *Dominguez Benitez*

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[7] This error in the court of appeals' reading of *Jones* is evident in the court's transmogrification of *Jones*' qualified statement that there is no effect on substantial rights "[w]here the effect of an alleged error is *so* uncertain," 527 U.S. at 394-95 (emphasis added), into the unqualified (and erroneous) statement that *Jones* precludes finding the third prong satisfied where the effect of the error "is uncertain or indeterminate." Pet. App. 17a.

on this central aspect of the plain error test would provide yet another reason for this Court to grant certiorari.

2. The court of appeals also erred in focusing dispositively on the question whether petitioner's sentence would have been different under a discretionary sentencing system. As the Fourth, Sixth, and Ninth Circuits have expressly recognized, it suffices for a defendant to establish that his pre-*Booker* sentence under the Sentencing Guidelines would have been lower in the absence of unconstitutional judicial factfinding; the defendant need not also establish what might have happened if the sentencing judge had been given post-*Booker*-style discretion. *See, e.g.*, *Hughes*, 396 F.3d at 380 n.6. This is because the relevant error being analyzed for plain error purposes is *not* the district court's failure to anticipate the post-*Booker* discretionary system; it is the Sixth Amendment error of imposing an enhanced sentence under the Guidelines based on judicial factfinding. Thus, the court of appeals got things exactly backwards when it ruled, in addressing the third plain error prong, that "the constitutional error . . . is not the use of extra-verdict enhancements. . . . [T]he error is the mandatory nature of the guidelines once the guidelines range has been determined." Pet. App. 16a-17a.

Booker itself was clear about the nature of the Sixth Amendment right that was violated: "the defendant's right to have the jury find the existence of 'any particular fact' that the law makes essential to his punishment. . . . That right is implicated whenever a judge seeks to impose a sentence that is not solely based on 'facts reflected in the jury verdict or admitted by the defendant'" *Booker*, 125 S. Ct. at 749. The separate determination by this Court to make the Guidelines advisory was a forward-looking remedy that does not change the nature of the fundamental Sixth Amendment error at issue. The Eleventh Circuit was therefore incorrect in analyzing the third prong by reference to an "error" consisting of the failure to treat the Guidelines as discretionary, and in finding it insufficient that petitioner's

sentence exceeded the maximum justified under the Guidelines by the facts found by the jury or admitted by petitioner.

3. Furthermore, even setting aside the two preceding points, the court of appeals' assessment of the likelihood of a lower sentence under a discretionary system is overly simplistic and devoid of analysis. There is reason to believe that it is *not* just as likely that a discretion-exercising judge would increase a sentence as decrease it. Data from the U.S. Sentencing Commission has shown that judges are more than 20 times as likely to grant downward departures as they are to grant upward departures. *See* U.S. Sentencing Commission, *2002 Sourcebook*, tbl. 26. To be sure, departure frequency is not an exact measure of what judges will do with their newfound discretion under *Booker*, since departures are not fully discretionary. It does suggest, however, that judges are significantly more inclined to exercise their discretion to reduce sentences rather than to increase them, and the post-*Booker* sentencing system will allow them to consider a wide array of mitigating factors not previously deemed relevant under the Guidelines.

4. Finally, even if none of the above factors made clear that a Sixth Amendment violation under *Booker* necessarily affects substantial rights, it would be appropriate—in light of the importance of the right at stake and the practical impossibility of making a case-by-case showing that a district judge, if given discretion, would have imposed a lighter sentence—either to presume an effect on substantial rights (or regard the error as "structural"), *see Olano*, 507 U.S. at 735, 739, or to require, as the Second Circuit did in *Crosby*, a remand to the district court for an informed determination of whether the error affected the defendant's sentence.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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February 23, 2005

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 04-12676
Non-Argument Calendar.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

VLADIMIR RODRIGUEZ,
Defendant-Appellant.

Appeal from the United States District Court
for the Middle District of Florida.
D.C. Docket No. 03-00217-CR-T_23-EAJ

FILED: February 4, 2005.

Before CARNES, MARCUS and FAY, Circuit Judges.

CARNES, Circuit Judge:

Vladimir Rodriguez appeals his 109-month sentences for conspiracy to possess with intent to distribute 3, 4-methylenedioxymethamphetamine ("MDMA"), also known as ecstasy, in violation of 21 U.S.C. §§ 841(b)(1)(C) and 846, and possession with intent to distribute MDMA, in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(b)(1)(C). Rodriguez argues that the district court's calculation of the amount of MDMA attributable to him in determining his base offense level, pursuant to the United States Sentencing Guidelines ("guidelines"), was not supported by the evidence.

Rodriguez also contends for the first time on appeal that the district court violated his Fifth and Sixth Amendment rights by determining his offense level based on facts that were neither charged in his indictment nor proven to a jury. That contention is based on *Blakely v. Washington*, 542 U.S. ___, 124 S. Ct. 2531 (2004), which was extended to the

federal sentencing guidelines recently in *United States v. Booker*, 543 U.S. ___, 125 S. Ct. 738 (2005).

I.

A federal grand jury returned a superseding indictment charging Rodriguez with the drug conspiracy and possession crimes we have described. During his trial on the charges, the government introduced evidence of a conspiracy that involved Alex Rodriguez, appellant's brother, supplying MDMA tablets to a number of people in Tampa, Florida, including Jorge Salgado Tergers ("Salgado"), for distribution in Tampa and in other locations. Rodriguez himself was arrested on September 5, 2002, after he transported 2,000 tablets of MDMA from Miami to Tampa as part of a deal between Salgado and a buyer who was working for the government as a confidential informant.

Co-conspirator Salgado, as part of his cooperation with the government, testified during the trial of this case to the following facts. After Salgado traveled from Cuba to the United States in April 2000, he began selling cocaine. When Salgado's customers requested MDMA tablets, Salgado asked his friend, Ovidio Gonzalez, to introduce him to Omar Oliva and Alex Rodriguez, two men in Miami who were supplying MDMA. Salgado and Gonzalez then began purchasing MDMA tablets from Oliva and Alex Rodriguez, after which they resold the tablets in Tampa. In conducting these sales, Salgado and Gonzalez either took turns traveling to Miami to pick up the tablets or they employed other people, including Rafael Ruz, to transport them.

Salgado further testified that in 2001 he was arrested for violating the terms of probation that had been imposed by a state court as a result of his previous convictions for dealing MDMA. Thereafter, in October 2001, Salgado was released from custody and traveled to Miami to meet with some MDMA suppliers. Salgado was introduced to Vladimir Rodriguez, the appellant, who had recently arrived in the United States from Cuba. Salgado described how a few

months later Rodriguez joined this conspiracy and began transporting MDMA tablets to Tampa for Salgado and Gonzalez. Salgado later learned that Rodriguez was distributing these drugs inequitably, bringing "like five [thousand tablets] for [Gonzalez]" to sell but only "three [thousand]" for Salgado.

When asked how many times between Salgado's release from custody in October 2001 and Salgado's arrest in this case on September 5, 2002, Rodriguez had transported MDMA tablets to Tampa for him, Salgado answered: "I couldn't tell you exactly, but it would have been 10, 12, 13 times during that three-month period." When asked how many tablets, on average, were involved in each delivery, he answered:

> There were three or four thousand—three or four thousand, five thousand, at least to me, for each trip. It could have been the 10 or 12 times. It could have been 25, 30,000 pills, 30, 35,000 pills; I don't know.

In addition, Salgado testified that, when his girlfriend was arrested for possessing MDMA tablets, he had agreed to work as a confidential informant for Drug Enforcement Administration Special Agent Cesar Diaz. But Salgado continued to deal MDMA tablets illegally while he was working as a CI, and he ultimately was caught dealing drugs to two other people who turned out to be CIs themselves.

Agent Diaz also testified during Rodriguez's trial. He described how, when he discovered that Salgado had not ceased his illegal drug activities, their relationship had "sour[ed]," and he began building a criminal case against Salgado. Agent Diaz arranged three controlled buys, using another CI to act as a purchaser of Salgado's MDMA tablets on August 2, 8, and 23, 2002, for quantities of 50, 500, and 500 MDMA tablets respectively. Agent Diaz set up a "buy-bust" for September 5, 2002, during which he planned to arrest Salgado.

During his testimony Agent Diaz described how, during that "buy-bust," Salgado entered the home of another CI, sold 2,000 tablets, and was arrested. Salgado immediately agreed to cooperate with Agent Diaz and told him that the man in the vehicle outside the home had transported the tablets. After discovering Rodriguez in the vehicle, law enforcement officials arrested him and recovered from inside the vehicle, among other items: a calculator on Rodriguez's lap; one notebook without identification that contained entries relating to drug sales; and another notebook bearing Rodriguez's name and containing phone numbers, including Oliva's number. On cross-examination, Agent Diaz conceded that it was "partially true" that Salgado's credibility "was shot" with him.

In addition, co-conspirator Ruz testified during this trial. Ruz stated that he had started selling MDMA tablets in Tampa for Salgado in February or March 2001. Although Ruz had begun selling small amounts of MDMA, he "moved up from a hundred pills a week to like 500," and he "kept getting more and more as the weeks went on," up until Salgado began sending him to Miami to transport the tablets back to Tampa. Ruz met Rodriguez during his third trip to Miami. After that trip, Salgado asked Ruz to stop transporting MDMA tablets and to concentrate on sales. Salgado then had Rodriguez and others transport the tablets. Ruz stated that he personally knew that Rodriguez had delivered MDMA tablets to Tampa "maybe four times; three, four times," and that he had met with Rodriguez in a Tampa coffee shop as late as August or September 2002.

Rodriguez took the stand and testified on his own behalf, insisting that he had no involvement in the drug conspiracy. Rodriguez said that he had been waiting in the vehicle in which he was arrested on September 5, 2002 because he wanted Salgado's help in bringing Rodriguez's family to the United States.

The jury convicted Rodriguez on both counts. It was not asked to return any special findings on drug amount.

II.

Prior to sentencing, a probation officer prepared a presentence investigation report ("PSR"), which contained, among other information, a description of the offense conduct, Rodriguez's personal characteristics, and the fact that he had no known prior convictions. The PSR recommended that Rodriguez's base offense level be set at 32, pursuant to U.S.S.G. § 2D1.1(c)(4) (the guideline covering from 1,000 to 3,000 kilograms of marijuana), because Rodriguez's drug offense involved 30,000 tablets of MDMA, the equivalent of 2,205 kilograms of marijuana.[1] It also recommended that the base offense level be adjusted upward two levels, pursuant to U.S.S.G. § 3C1.1, for obstruction of justice, because Rodriguez had falsely testified under oath during his trial that he had no involvement in the crimes for which he was convicted. With a total offense level of 34 and a criminal history category of I, Rodriguez's resulting guideline range would be 151 to 188 months' imprisonment.

Rodriguez filed written objections to the PSR's calculation of the drug amount, contending among other things, that the court should not hold him accountable for 30,000 MDMA tablets because that quantity was supported only by Salgado's trial testimony, which was inconsistent, uncertain, vague, and therefore unreliable. Rodriguez argued that Salgado's testimony lacked "sufficient reliability and credibility" because Salgado previously had deceived law enforcement officers with whom he was working as a CI,

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[1] The PSR determined that Rodriguez conspired to distribute 30,000 MDMA tablets, each with an average weight of 147 milligrams, making the total weight of all the tablets 4,410 grams. According to the guidelines drug equivalency table, 1 gram of MDMA is the equivalent of 500 grams of marijuana. U.S.S.G. 2D1.1, cmt. n.10. Thus, 4,410 grams of MDMA is the equivalent of 2,205 kilograms of marijuana.

and the results of a polygraph examination that Rodriguez had taken contradicted Salgado's trial testimony.[2] In his objections Rodriguez contended that he should be held accountable for only the 2,000 tablets that he had delivered to Salgado on September 5, 2002.

At the sentence hearing, Rodriguez pressed his objection to the PSR's calculation of drug quantity. Rodriguez argued that: (1) the results of his polygraph examination "impeached" Salgado's testimony on drug quantity;[3] (2) Salgado's testimony that Rodriguez had made 10 to 12 trips to Tampa and was responsible for 30,000 tablets was vague and uncorroborated; (3) Salgado was a convicted felon who had deceived the government initially while working as a CI and was not a credible witness; and (4) Ruz had testified that he only knew Rodriguez was in Tampa on three or four occasions.

The government responded that Salgado had no reason to lie about Rodriguez's relevant conduct because Salgado, himself, had been held accountable for the same quantity of drugs. The government also pointed out that Rodriguez himself had lied, because his sentencing arguments

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[2] Rodriguez attached to his objections a copy of the results of his polygraph examination. These results included that he had answered "yes" when questioned whether (1) his story about being in Tampa on only two occasions was true, and (2) both Salgado and Ruz lied when they testified in court. Moreover, Rodriguez had answered "no" when questioned whether (1) he had come to Tampa on more than two occasions, (2) he met Ruz before his trial, and (3) he had brought more than three packages of MDMA to Tampa for Salgado.

The implication of the polygraph questions, of course, is that Rodriguez had brought three packages of MDMA to Tampa for Salgado, which contradicts Rodriguez's own trial testimony denying any involvement with the drug conspiracy.

[3] Although the prosecutor initially objected to the admission of the results of this polygraph examination, he subsequently withdrew this objection. The court did admit the results into evidence for whatever they were worth.

contradicted his own trial testimony during which he insisted that he had no involvement at all in the drug conspiracy. The government contended that Salgado's testimony on drug quantity was corroborated by Ruz's testimony on Rodriguez's role in the conspiracy. Ruz testified that he had met Rodriguez in Miami and Tampa on several occasions and that Rodriguez was to bring him MDMA tablets. He said that he personally knew Rodriguez had transported MDMA tablets from Miami to Tampa "three, four times." Finally, the government argued that the results of Rodriguez's polygraph examination were questionable because his own statements during the examination were inconsistent with his trial testimony.

The district court determined that, although Salgado's credibility was undermined by his history of dishonesty, Ruz's testimony was specific as to his interactions with Rodriguez, and Rodriguez's credibility on the issue of the quantity of drugs he had transported was undermined by his inconsistent trial testimony that he had no involvement in the crime. The court also found that the results of Rodriguez's polygraph examination were not persuasive because they were inconsistent with his trial testimony and because the questions asked during the examination were not related specifically enough to drug quantity. The court overruled Rodriguez's objection to the PSR's calculation of drug quantity.

After granting Rodriguez's request for a two-level minor role downward adjustment, pursuant to U.S.S.G. § 3B1.2(b), the district court determined that the resulting guideline range was 97 to 121 months' imprisonment.[4] It sentenced

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[4] This guidelines range is based on an adjusted offense level of 30 and a criminal history category of I. Because Rodriguez received a minor role reduction pursuant to § 3B1.2(b), his base offense level was 30, even though the quantity of drugs found by the district court would otherwise have yielded a base offense level of 32. *See* U.S.S.G. § 2D1.1(a)(3). The two-point enhancement for obstruction of justice and the two-point

Rodriguez to 109 months' imprisonment and 3 years' supervised release.

III.

Rodriguez's only preserved issue is whether the district court erred in its factual determination of the drug quantity for which Rodriguez was responsible. Our review is limited to clear error. *United States v. Auguste*, 392 F.3d 1266, 1267 (11th Cir. 2004); *United States v. Clay*, 376 F.3d 1296, 1300 (11th Cir. 2004). Where the factfinding resolves a swearing match of witnesses, the resolution will almost never be clear error. *Anderson v. City of Bessemer City*, 470 U.S. 564, 575, 105 S. Ct. 1504, 1512 (1985) ("[W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error."); *see also United States v. Gregg*, 179 F.3d 1312, 1316 (11th Cir. 1999) ("We accord great deference to the district court's credibility determinations.").

Section 2D1.1 of the guidelines provides that the base offense level for a possession or a conspiracy drug offense is ordinarily calculated by determining the quantity of drugs attributable to a defendant. *See generally* U.S.S.G. § 2D1.1(a). The guidelines also provide that courts shall consider as relevant to this determination "all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant ... that occurred during the commission of the offense of conviction...." U.S.S.G. § 1B1.3(a)(1)(A).

(continued...)

reduction for minor role canceled each other out, yielding an adjusted base offense level of 30.

When a defendant objects to a factual finding that is used in calculating his guideline sentence, such as drug amount, the government bears the burden of establishing the disputed fact by a preponderance of the evidence. *United States v. Agis-Meza*, 99 F.3d 1052, 1055 (11th Cir. 1996). "The preponderance of evidence is a relaxed evidentiary standard, however, it does not grant the court a license to sentence a defendant in the absence of sufficient evidence when that defendant has properly objected to a factual conclusion." *Id.*

" 'Where there is no drug seizure or the amount seized does not reflect the scale of the offense, the court shall approximate the quantity of the controlled substance.' " *United States v. Frazier*, 89 F.3d 1501, 1506 (11th Cir.1996) (quoting U.S.S.G. § 2D1.1, cmt. n.12). Moreover, "[i]n estimating the quantity of drugs attributable to a defendant, a court may base its computation on evidence showing the average frequency and amount of a defendant's drug sales over a given period of time." *Id.* Thus, sentencing "may be based on fair, accurate, and conservative estimates of the quantity of drugs attributable to a defendant." *United States v. Zapata*, 139 F.3d 1355, 1359 (11th Cir. 1998) (per curiam).

Here, when the government asked Salgado at trial how many times, between Salgado's release from custody in October 2001 and his arrest in this case on September 5, 2002, Rodriguez had transported drugs for him, Salgado conceded that "I couldn't tell you exactly[.]" But, when the government asked Salgado how many tablets, on average, were involved in each delivery, Salgado responded:

> [t]here were three or four thousand—three or four thousand, five thousand, at least to me, for each trip. It could have been the 10 or 12 times. It could have been 25, 30,000 pills, 30, 35,000 pills; I don't know.

Salgado also testified that Rodriguez joined the conspiracy a "few months" after October 2001, when Salgado was released from custody, and that Rodriguez

began transporting MDMA tablets to Tampa for Salgado and Gonzalez. Salgado testified that, in transporting these tablets, Rodriguez was distributing them inequitably, bringing "like five [thousand] for [Gonzalez]" to sell but only "three [thousand]" for Salgado. After conceding that he could not testify as to the exact number of times that Rodriguez had transported the tablets to Tampa for him, Salgado stated that "it would have been 10, 12, 13 times."

To the extent Rodriguez is arguing that Salgado's testimony was not credible because of (1) his criminal history, (2) his admission that he deceived a DEA agent while acting as a CI, and (3) his desire for the government to recommend a § 5K1.1 departure for substantial assistance, the district court acknowledged those factors, but still found Salgado's testimony on drug amount to be credible.

Rodriguez contends, in this appeal for the first time, that he was involved only in the "buy-bust" and in the three preceding controlled buys. That contention is inconsistent with his sworn testimony at trial that he had no involvement at all in the drug crimes, and is also inconsistent with his argument at sentencing that he should be held accountable only for the drugs seized as part of the "buy-bust."

In addition, Salgado's testimony about Rodriguez's conduct as a participant in the conspiracy and about the amounts of MDMA tablets involved in the transactions was corroborated by Ruz's testimony. Ruz met Rodriguez during his third trip to Miami, after which Salgado had Ruz concentrate on sales while Rodriguez and others transported the tablets. Ruz also testified that he knew Rodriguez had delivered MDMA tablets to Tampa "maybe four times; three, four times," and once within two weeks of Rodriguez's arrest.

The district court's calculation of drug amount under the guidelines, therefore, was supported by a preponderance of the evidence and was anything but clearly erroneous.

IV.

Rodriguez's other contention, the one that he did not preserve with an objection in the district court, is what he refers to in his initial brief as *Blakely* error, and in his supplemental brief as *Booker* error. In *Blakely*, the Supreme Court held that the imposition of a sentencing enhancement under the state of Washington's mandatory guidelines system based on facts neither admitted by the defendant nor found by the jury violated the defendant's Sixth Amendment right to trial by jury. 124 S. Ct. at 2534-38. That holding was recently applied to the federal sentencing guidelines in *Booker*, 125 S. Ct. at 749, where the Supreme Court found "no distinction of constitutional significance between the Federal Sentencing Guidelines and the Washington procedures at issue [in *Blakely*]." The holding in *Booker* is that the Sixth Amendment right to trial by jury is violated where *under a mandatory guidelines system* a sentence is increased because of an enhancement based on facts found by the judge that were neither admitted by the defendant nor found by the jury. *See id.* at 749-56.

Because Rodriguez did not object on this basis in the district court, our review is only for plain error. See *United States v. Cotton*, 535 U.S. 625, 631-32, 122 S. Ct. 1781, 1785 (2002) (applying plain error review to the defendant's newly raised claim of error based on *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348 (2000)); *United States v. Duncan*, 381 F.3d 1070, 1073-75 (11th Cir. 2004) (reviewing for plain error defendant's *Blakely* challenge to the court's increase of the offense level based on its finding that his offense involved cocaine base, where the defendant's only objection to this finding at sentencing was based on the sufficiency of the evidence); *see also Booker*, 125 S. Ct. at 769 (the plain error rule applies and will prevent a new sentencing hearing from being necessary in every case on direct appeal involving a pre-*Booker* sentence).

Under plain error review, which is authorized by Fed. R. Crim. P. 52(b), federal appellate courts have only "a limited power to correct errors that were forfeited because [they were] not timely raised in [the] district court." *United States v. Olano*, 507 U.S. 725, 731, 113 S. Ct. 1770, 1776 (1993) (citing Fed. R. Crim. P. 52(b)). An appellate court may not correct an error the defendant failed to raise in the district court unless there is: "(1) error, (2) that is plain, and (3) that affects substantial rights." *Cotton*, 535 U.S. at 631, 122 S. Ct. at 1785 (quotations and internal marks omitted). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affects the fairness, integrity, or public reputation of judicial proceedings." *Id.* (quotations and internal marks omitted).

The Supreme Court has instructed us that plain error review should be exercised "sparingly," *Jones v. United States*, 527 U.S. 373, 389, 119 S. Ct. 2090, 2102 (1999), and only "in those circumstances in which a miscarriage of justice would otherwise result." *Olano*, 507 U.S. at 736, 113 S. Ct. at 1779 (quotation omitted). In similar fashion we have explained that "our power to review for plain error is 'limited' and 'circumscribed,' " *United States v. Humphrey*, 164 F.3d 585, 588 (11th Cir. 1999) (quoting *Olano*, 507 U.S. at 731, 113 S. Ct. at 1776), that "[t]he plain error test is 'difficult to meet,' " *United States v. King*, 73 F.3d 1564, 1572 (11th Cir. 1996) (quoting *United States v. Sorondo*, 845 F.2d 945, 948-49 (11th Cir. 1988)), and that "[t]he plain error rule places a daunting obstacle before [the appellant]." *United States v. Pielago*, 135 F.3d 703, 708 (11th Cir. 1998).

The first prong of the plain error test is satisfied in this case. Under a mandatory guidelines system, Rodriguez's sentence was enhanced as a result of findings made by the judge that went beyond the facts admitted by the defendant or found by the jury. The enhancement was based on the judge's drug quantity findings, and it increased Rodriguez's

base offense level, guidelines range, and sentence under a mandatory guidelines system.[5] So, there was *Booker* error.

The second prong of the plain error test is also met. Although the error was not "plain" at the time of sentencing, "where the law at the time of trial was settled and clearly contrary to the law at the time of appeal—it is enough that the error be 'plain' at the time of appellate consideration." *Johnson v. United States*, 520 U.S. 461, 468, 117 S. Ct. 1544, 1549 (1997). Because of *Booker*, the error is now plain.

The third prong of the plain error test, however, is another matter. It requires that an error have "affect[ed] substantial rights," which almost always requires that the error " 'must have affected the outcome of the district court proceedings.'" *Cotton*, 535 U.S. at 632, 122 S. Ct. at 1786 (quoting *Olano*, 507 U.S. at 734, 113 S. Ct. at 1778). The standard for showing that is the familiar reasonable probability of a different result formulation, which means a probability "'sufficient to undermine confidence in the outcome.'" *United States v. Dominguez Benitez*, ___ U.S. ___, 124 S. Ct. 2333, 2340 (2004) (quoting *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068 (1984)). In regard to this third prong, "[i]t is the defendant rather than the [g]overnment who bears the burden of persuasion with respect to prejudice." *Olano*, 507 U.S. at 734, 113 S. Ct. at 1778.

This burden of showing prejudice to meet the third-prong requirement is anything but easy. The Supreme Court has explained that the "burden should not be too easy," because

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[5] The other enhancement applied was under § 3C1.1 for obstruction of justice because Rodriguez took the stand and falsely denied his guilt. It may be that enhancement was not *Booker* error because the jury verdict convicting Rodriguez of the crimes he denied necessarily, albeit implicitly, found that he had engaged in behavior that fits within § 3C1.1. We need not decide that question, because the drug quantity was not implicitly found in the jury verdict.

the prejudice standard "should enforce the policies that underpin Rule 52(b) generally, to encourage timely objections and reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error." *Dominguez Benitez*, 124 S. Ct. at 2340. Particularly important to the present inquiry is what the Supreme Court has said about situations in which it is unclear what effect, if any, an error had.

In *Jones*, a capital case, the Court was confronted with a situation in which an unobjected to error in the jury instructions may, or it may not, have prejudiced the defendant. In finding that the error did not make it past the third prong of the plain error test, the Court explained:

> [E]ven assuming that the jurors were confused over the consequences of deadlock, petitioner cannot show the confusion necessarily worked to his detriment. It is just as likely that the jurors, loath to recommend a lesser sentence, would have compromised on a sentence of life imprisonment as on a death sentence. *Where the effect of an alleged error is so uncertain, a defendant cannot meet his burden of showing that the error actually affected his substantial rights.* Cf. *Romano*, 512 U.S. at 14, 114 S. Ct. 2004. In *Romano*, we considered a similar argument, namely, that jurors had disregarded a trial judge's instructions and given undue weight to certain evidence. In rejecting that argument, we noted that, even assuming that the jury disregarded the trial judge's instructions, "[i]t seems equally plausible that the evidence could have made the jurors more inclined to impose a death sentence, or it could have made them less inclined to do so." *Ibid. Any speculation on the effect of a lesser sentence recommendation, like the evidence in Romano, would have had such an indeterminate effect on the outcome of the proceeding that we cannot conclude that any alleged error in the District Court's instructions affected petitioner's substantial rights.* See *Park*, 421 U.S. at 676,

95 S. Ct. 1903; *Lopez*, 373 U.S. at 436-437, 83 S. Ct. 1381.

Jones, 527 U.S. at 394-95, 119 S. Ct. at 2105 (emphasis added). *Cf. Romano v. Oklahoma*, 512 U.S. 1, 14, 114 S. Ct. 2004, 2013 (1994) ("Either conclusion necessarily rests upon one's intuition."). The lesson of the Supreme Court's *Jones* decision is that the burden truly is on the defendant to show that the error actually did make a difference: if it is equally plausible that the error worked in favor of the defense, the defendant loses; if the effect of the error is uncertain so that we do not know which, if either, side it helped the defendant loses. Where errors could have cut either way and uncertainty exists, the burden is the decisive factor in the third prong of the plain error test, and the burden is on the defendant.

With these principles in mind, we turn to the task of applying the third prong to this case. The error that was committed in pre-*Booker* sentencing, like that which occurred in this case, is not that there were extra-verdict enhancements—enhancements based on facts found by the judge that were not admitted by the defendant or established by the jury verdict—that led to an increase in the defendant's sentence. The error is that there were extra-verdict enhancements used in a mandatory guidelines system. We know for two reasons that if the same extra-verdict enhancements had been found and used in the same way in a non-mandatory guidelines system the result would have been constitutionally permissible.

One reason is that Justice Stevens' majority opinion in *Booker* explicitly tells us that: "If the Guidelines as currently written could be read as merely advisory provisions that recommended, rather than required, the selection of particular sentences in response to differing sets of facts, their use would not implicate the Sixth Amendment." *Booker*, 125 S. Ct. at 750; *id.* at 764 (Breyer, J., maj. op.) ("[W]ithout this provision—namely the provision that makes

the relevant sentencing rules mandatory and imposes binding requirements on all sentencing judges—the statute falls outside the scope of *Apprendi's* requirement." (internal quotation omitted)).

The other reason we know that the use of extra-verdict enhancements in a non-mandatory guidelines system is not unconstitutional is that the other *Booker* majority opinion, the one authored by Justice Breyer, specifically provides for extra-verdict enhancements in all future sentencings. *Id.* at 764-65. The Court specifically held that the guidelines system was constitutional once two parts of the Sentencing Reform Act were excised: the part in 18 U.S.C. § 3553(b)(1) making the guidelines result binding on the sentencing court; and the part in § 3742(e) requiring *de novo* review of sentences on appeal. *Id.* at 764 ("With these two sections excised (and statutory cross-references to the two sections consequently invalidated), the remainder of the Act satisfies the Court's constitutional requirements."). No part of the Act or guidelines concerning extra-verdict enhancements was excised or modified by the *Booker* decision. The same extra-verdict enhancement provisions apply after *Booker* as before.

Stated somewhat differently, if we were to vacate the sentence in this case and remand for resentencing in light of *Booker*, the district court would be faced with exactly the same evidence presenting exactly the same factual issues that it has already resolved, and it would be required to at least consider exactly the same guideline enhancement provisions it has already applied. No guideline provisions have changed in any way. All that has changed is that the guidelines range is now advisory; it no longer dictates the final sentencing result but instead is an important factor that the sentencing court is to consider along with the factors contained in § 3553(a) in reaching the sentencing result. *Id.* at 764-65.

The point of all this for third-prong plain error review purposes is that the constitutional error whose prejudicial measure we take is not the use of extra-verdict

enhancements. Their use remains a constitutional part of guidelines sentencing in the post-*Booker* era. The constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge; the error is the mandatory nature of the guidelines once the guidelines range has been determined. Therefore, in applying the third prong, we ask whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case. The obvious answer is that we don't know. If the district court judge in this case had the liberty of increasing or decreasing Rodriguez's sentence above or below the guidelines range, he might have given Rodriguez a longer sentence, or he might have given a shorter sentence, or he might have given the same sentence. The record provides no reason to believe any result is more likely than the other. We just don't know.

Because we don't know, the Supreme Court's *Jones* decision is controlling. It tells us that where the effect of an error on the result in the district court is uncertain or indeterminate—where we would have to speculate—the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error; he has not met his burden of showing prejudice; he has not met his burden of showing that his substantial rights have been affected. *Jones*, 527 U.S. at 394-95, 119 S. Ct. at 2105. Because this appellant has not carried his burden as to the third prong of the plain error test, we have no occasion to decide how he would have fared under the fourth prong.

We are aware that three other federal courts of appeals have reached results different from our own in regard to whether *Booker* error is plain error. We have carefully read their opinions and are unpersuaded by them. The Fourth Circuit's conclusion in *United States v. Hughes*, ___ F.3d ___, 2005 WL 147059 (4th Cir. Jan. 25, 2005), that the third prong of the plain error test is met in *Booker*-error cases is based on measuring prejudice in terms of the effect the extra-

verdict enhancements in that case had in determining the guidelines sentencing range. *Id.* at *3-4, 5. Because those enhancements increased the sentencing range, they resulted in a higher sentence and in the Fourth Circuit's view prejudicially affected the outcome. *Id.* at *5. The problem with the reasoning is that, as we have already discussed, both majority opinions in *Booker* make clear that the decisive factor that makes pre-*Booker* sentencing problematic is not extra-verdict enhancements but their use in a mandatory guidelines system. Indeed, all nine justices joined one or both of those opinions, so all nine agreed that the use of extra-verdict enhancements in an advisory guidelines system is not unconstitutional.

Extra-verdict enhancements are to be determined and used in the post-*Booker* world. Indeed, the Fourth Circuit's remand instructions to the district court in *Hughes* recognize as much, because they tell the court to consider the guidelines range as increased by the extra-verdict enhancements when it re-sentences the defendant. *Id.* at *8 ("Because we conclude that the district court correctly determined the range prescribed by the guidelines, on remand the court shall consider that range as well as other relevant factors set forth in the guidelines and those factors set forth in § 3553(a) before imposing the sentence." (footnote omitted)). If the finding and consideration of the extra-verdict enhancements were the constitutional error in *Booker*, the Supreme Court in that case would not have permitted, and the Fourth Circuit itself in *Hughes* would not have directed, district courts to continue to find and consider such enhancements. Extra-verdict enhancements are still to be used. The change is the role of the guidelines range in the sentencing process, and it is that change against which the third-prong prejudice measure must be taken.

Another way of putting it is that the *Hughes* reasoning is wrong because it disconnects the error to be remedied on remand from the decision of whether there is to be a remand. The important function of the third prong of the plain error

test is to prevent a remand for additional proceedings where the defendant, who failed to make a timely objection, cannot show that there is a reasonable probability that a do-over would more likely than not produce a different result. *See Dominguez Benitez*, 124 S. Ct. at 2340 (explaining that one reason the plain error third-prong burden on the defendant should not be easy is that one of the policies underlying Rule 52(b) is to "reduce wasteful reversals by demanding strenuous exertion to get relief for unpreserved error"). That is why the yardstick of prejudice is change of outcome—a different result if the proceeding were done over with the error corrected. It makes little or no sense to say that there probably would have been a different sentence but for the use of extra-verdict enhancements, and on that basis alone send the case back for another round in which the very same extra-verdict enhancements are to be used again. That is, however, exactly what the Fourth Circuit did in *Hughes*.

For the third prong of the plain error test to serve its function, the prejudicial impact of the error, which is to say the likelihood of a different result if the error is removed, must be gauged in terms of the part of the procedure that is to be changed. In *Booker*-error cases that means gauging the likelihood of a different result when the guidelines range is considered advisory instead of mandatory (and any § 3553(a) factors not otherwise taken into account are considered, too). Therefore in order to satisfy the third prong of the plain error test, pre-*Booker* defendants must establish a reasonable probability that if the district court had considered the guidelines range it arrived at using extra-verdict enhancements as merely advisory, instead of mandatory, and had taken into account any otherwise unconsidered § 3553 factors, the court would have imposed a lesser sentence than it did. That inquiry makes sense because it hooks the prejudice inquiry to the procedural change necessary to remedy the error.

The only reason the *Hughes* opinion gives for focusing on the effect of the extra-verdict enhancements, instead of the

effect of treating the guidelines range as mandatory, is that the defendant said that was the error committed. This is the *Hughes* opinion's explanation:

> To demonstrate that the error was prejudicial, Hughes must show that "the error actually affected the outcome of the proceedings." Here, the error alleged by Hughes was that the district court imposed a sentence greater than the maximum authorized by the facts found by the jury alone. Had the district court imposed a sentence within that maximum, Hughes' sentence would have been calculated according to an Offense Level of 10 (corresponding to a prescribed range of 6 to 12 months' imprisonment)—markedly lower than the final Offense Level of 22 (corresponding to a prescribed range of 41 to 51 months' imprisonment) used by the district court. We therefore conclude that the error affected Hughes' substantial rights. *Accord United States v. Promise*, 255 F.3d 150, 160 (4th Cir. 2001) (en banc) (holding that *Apprendi* error resulting in increased sentence affected defendant's substantial rights).

2005 WL 147059, at *5 (footnote and internal citation omitted). In the footnote omitted from that quotation, the *Hughes* opinion says:

> The question for purposes of determining whether Hughes was prejudiced is not what the district court would have done had it imposed a sentence in the exercise of its discretion pursuant to § 3553(a). Hughes does not argue that the district court erred by failing to regard the guidelines as advisory in sentencing him. Rather, Hughes argues that the district court erred by imposing a sentence that was greater than the maximum authorized by the facts found by the jury alone. Therefore, the prejudice inquiry concerns what sentence the court would have imposed had it not committed the error of going beyond the facts found by the jury in imposing a sentence under the mandatory guideline regime then in existence. This case does not

> present the question of whether a defendant suffers prejudice because a sentencing court fails to treat the guidelines as advisory in determining the sentence.

Id. at *5 n. 6.

We disagree with the notion that the defendant can define the constitutional error, and thereby predetermine the outcome of the third prong of the plain error test, by the phrasing of his argument. The defendant does not get to define the constitutional error. The Supreme Court defined the constitutional error in *Booker*, and there the Court said that there would not have been any constitutional error if the guidelines had been used in an advisory instead of mandatory fashion. *Booker*, 125 S. Ct. at 750 (Stevens, J., maj. op.); *id.* at 764 (Breyer, J., maj. op.). Defendants cannot reshape that holding more to their liking. The Supreme Court said that the remedy is to use the guidelines in an advisory fashion (along with any § 3553(a) factors not otherwise considered). The prejudice inquiry must focus on what has to be changed to remedy the error, and the consideration of extra-verdict enhancements is not to be changed.

Put differently, regardless of Hughes' contention to the contrary, the district court did not err by "impos[ing] a sentence greater than the maximum authorized by the facts found by the jury alone." *Hughes*, 2005 WL 147059, at *5. The district court erred (understandably) by failing to recognize that it was not required to impose a sentence greater than the maximum authorized by the facts found by the jury alone. It erred in failing to treat the guidelines as advisory. If the court had treated the guidelines as advisory, there would have been no constitutional error.

The correct result of applying the third prong of the plain error test is revealed in the following sentence from the *Hughes* opinion: "The record does not provide any indication of what sentence the district court would have imposed had it exercised its discretion under § 3553(a), treating the guidelines as merely advisory." *Id.* at *5 n. 7. As we have

explained, where the record does not provide "any indication" that there would have been a different sentence if the court had recognized and exercised its § 3553(a) discretion and treated the guidelines range as merely advisory, the party with the burden of showing a reasonable probability of a different result loses. That party is the defendant.

The second federal court of appeals to address the *Booker* plain error issue was the Sixth Circuit. In *United States v. Oliver*, ___ F.3d ___, 2005 WL 233779 (6th Cir. Feb. 2, 2005), that Court found plain error in a pre-*Booker* case where one extra-verdict enhancement increased the sentencing range of the defendant. It reasoned that consideration of the extra-verdict enhancement "unconstitutionally increased Oliver's sentence beyond that which was supported by the jury verdict and Oliver's criminal history," and "[a]s a result Oliver arguably received a sentence that was longer than his sentence would have been absent a Sixth Amendment violation." *Id.* at *8. That analysis is flawed for several reasons similar to those that affected the Fourth Circuit's thinking in *Hughes*.

The Sixth Circuit's *Oliver* reasoning assumes that the Sixth Amendment violation is the use of an extra-verdict enhancement. The Sixth Circuit makes the same mistake the Fourth Circuit does by measuring prejudice from use of a factor that the district court may permissibly consider when resentencing on remand. *Compare id. with Hughes*, 2005 WL 147059, at *5. It, like the Fourth Circuit, disconnects the prejudice inquiry from the change to be made.

The Sixth Circuit in *Oliver* makes another mistake as well. It measures prejudice based on the speculative standard of what is "arguable." *See Oliver*, 2005 WL 233779, at *8 ("As a result Oliver arguably received a sentence that was longer than his sentence would have been absent a Sixth Amendment violation.") "Arguable" means "susceptible to debate, challenge, or doubt; questionable." Random House

Unabridged Dictionary 112 (2d ed.1993). "Arguable" is not enough to satisfy the third-prong test of prejudice, particularly where it is just as arguable that the pre-*Booker* result would not change in a post-*Booker* resentencing where the guidelines are only advisory.[6]

The third federal appeals court to address the *Booker* plain error issue is the Second Circuit. Its decision in *United States v. Crosby*, ___ F.3d ___, 2005 WL 240916 (2d Cir. Feb. 2, 2005), represents the most novel approach to the *Booker* third-prong plain error inquiry. The plain error rule is one to be applied by appellate courts in determining whether to vacate or reverse district court judgments, including sentences as well as convictions, based on error that was not preserved by proper and timely objection in the district court. The prejudice inquiry is to be made based on the record before the appellate court. *See Dominguez Benitez*, 124 S. Ct. at 2340 (Under plain error review, "[a] defendant must ... satisfy the judgment of the reviewing court, *informed by the entire record*, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." (emphasis added and internal quotation omitted)); *United States v. Vonn*, 535 U.S. 55, 59, 122 S. Ct. 1043, 1046 (2002) ("[A] silent defendant has the burden to satisfy the plain-error rule and ... a reviewing court may consult the whole record when considering the effect of any error on substantial rights."). Yet, in *Crosby* the Second Circuit delegated to the district courts the task of determining

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[6] The *Oliver* Court also found that the fourth prong of the plain error test was met as a result of the extra-verdict obstruction of justice enhancement applied in that pre-*Booker* case. 2005 WL 233779, at *8. Yet, the very next day a different panel of the Sixth Circuit reached exactly the opposite conclusion in another pre-*Booker* case involving exactly the same enhancement. *United States v. Bruce*, ___ F.3d __, 2005 WL 241254, at *17 (6th Cir. Feb. 3, 2005). As we have already mentioned, we need not reach the fourth prong in this case because of our conclusion that Rodriguez has not satisfied the third prong.

whether the appellant has carried his burden of showing a reasonable probability of a different result.

According to *Crosby*, each Second Circuit pre-*Booker*-error case in which the issue was not preserved by proper objection will be remanded to the district court. On remand the district court is to determine whether it would have imposed a "materially different" or "nontrivially different" sentence under the post-*Booker* sentencing rules. *Crosby*, 2005 WL 240916, at *12. If so, then there is third-prong prejudice, there is plain error, and the district court is to vacate its earlier sentence and resentence the defendant. *Id.* If the district court decides that it would not have sentenced the defendant to a materially or nontrivially different sentence under the *Booker* rules, then there is no third-prong prejudice and thus no plain error; the initial sentence remains. *Id.* The party that loses in the district court is to be allowed to appeal, *id.* at *13, which means the court of appeals will be reviewing the district court's decision on whether the unpreserved error should have been noticed and corrected the first time it was before the court of appeals.

The *Crosby* solution turns the review process on its head. The determination of plain error is the duty of courts of appeal, not district courts. *See Dominguez Benitez*, 124 S. Ct. at 2340 (Under plain error review, "[a] defendant *must ... satisfy the judgment of the reviewing court*, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding." (emphasis added and internal quotation omitted)); *Vonn*, 535 U.S. at 59, 122 S. Ct. at 1046 ("[A] silent defendant has the burden to satisfy the plain-error rule and ... a reviewing court may consult the whole record when considering the effect of any error on substantial rights.").

Crosby essentially requires resentencing in order to determine whether resentencing is required. The Second Circuit says that in order for district courts to decide what they would have done had the *Booker* rules been in effect,

the attorneys must be permitted to re-argue the sentencing issues as they would have argued had *Booker* been the law. *Crosby*, 2005 WL 240916, at *13. The district court is then to apply the *Booker* rules and see what sentence it would have imposed under those rules. There will be a do-over to decide if there should be a do-over. This procedure undermines the Supreme Court's teaching that one of the principal purposes of the plain error rule is to avoid needless reversals and remands. *Dominguez Benitez*, 124 S. Ct. at 2340. The *Crosby* solution will require not only that every sentence in a plain error pre-*Booker* case be remanded for what amounts to a mock-resentencing, but it will also add the real possibility of another appeal and another remand on top of that.

The *Crosby* solution cannot be reconciled with the Supreme Court's quite specific instruction about what federal appeals courts are to do when they cannot tell from the record on appeal whether the unpreserved error affected the outcome of the proceedings. Under *Jones*, if it is uncertain whether the error affected the result, if the effect is indeterminate, if we simply cannot tell from the appellate record, then the defendant loses. *Jones*, 527 U.S. at 394-95, 119 S. Ct. at 2105. The Second Circuit admits in *Crosby* that in pre-*Booker* cases "we cannot know whether a correct perception of the law would have produced a different sentence." *Crosby*, 2005 WL 240916, at *12. That should have been the end of the inquiry.

The only authority that *Crosby* cites for turning the plain error process upside down is 18 U.S.C. § 3742(f), which merely provides that: "If the court of appeals determines that—(1) the sentence was imposed in violation of law ..., the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate." *Crosby*, 2005 WL 240916, at *11. Acknowledging that the statutory provision "normally contemplates a remand for resentencing," *Crosby* reasons that, because remands for resentencing are authorized, "we

think an appellate court necessarily has the lesser power to remand for a determination of whether to resentence, and to permit resentencing." *Id.* That conclusion does not follow at all. In cases of non-preserved error appellate courts lack the authority to remand for resentencing where the requirements of the plain error rule have not been met. The remands being ordered are not, as *Crosby* suggests, for the purpose of determining "whether to resentence," but for the purpose of determining whether the third prong of the plain error test has been met so that the unpreserved error may be noticed and the appealed sentence vacated. Neither § 3742(f) nor any other part of the Sentencing Reform Act purports to give appellate courts the authority to delegate the decision of whether there has been plain error to the very court whose judgment is being reviewed.

We apply the plain error rule at the appellate level, as it is written, and as it has been consistently interpreted by the Supreme Court of the United States. Having done so here, we conclude that Rodriguez has failed to satisfy the third prong of the plain error test by showing that the *Booker* error in his case affected the outcome of his sentencing within the meaning of *Olano*, 507 U.S. at 734, 113 S. Ct. at 1777-78, and *Dominguez Benitez*, 124 S. Ct. at 2340.

AFFIRMED.

STATUTORY APPENDIX

1. The Jury Trial Clause of the United States Constitution, Amendment VI, provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law . . . .

* * *

2. Section 3553 of Title 18 of the United States Code, titled "Imposition of a Sentence," provides, in relevant part, as follows:

(a) Factors to be considered in imposing a Sentence.—The court shall impose a sentence sufficient, but not greater than necessary, to comply with the purposes set forth in paragraph (2) of this subsection. The court, in determining the particular sentence to be imposed, shall consider—

(1) the nature and circumstances of the offense and the history and characteristics of the defendant;

(2) the need for the sentence imposed—

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

(C) to protect the public from further crimes of the defendant; and

(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner;

(3) the kinds of sentences available;

(4) the kinds of sentence and the sentencing range established for—

(A) the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines—

(i) issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, subject to any amendments made to such guidelines by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(ii) that, except as provided in section 3742(g), are in effect on the date the defendant is sentenced; or

(B) in the case of a violation of probation or supervised release, the applicable guidelines or policy statements issued by the Sentencing Commission pursuant to section 994(a)(3) of title 28, United States Code, taking into account any amendments made to such guidelines or policy statements by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28);

(5) any pertinent policy statement—

(A) issued by the Sentencing Commission pursuant to section 994(a)(2) of title 28, United States Code, subject to any amendments made to such policy statement by act of Congress (regardless of whether such amendments have yet to be incorporated by the Sentencing Commission into amendments issued under section 994(p) of title 28); and

(B) that, except as provided in section 3742(g), is in effect on the date the defendant is sentenced.

(6) the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct; and

(7) the need to provide restitution to any victims of the offense.

(b) Application of guidelines in imposing a sentence.—

(1) **In general.**—Except as provided in paragraph (2), the court shall impose a sentence of the kind, and within the range, referred to in subsection (a)(4) unless the court finds that there exists an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines that should result in a sentence different from that described. In determining whether a circumstance was adequately taken into consideration, the court shall consider only the sentencing guidelines, policy statements, and official commentary of the Sentencing Commission. In the absence of an applicable sentencing guideline, the court shall impose an appropriate sentence, having due regard for the purposes set forth in subsection (a)(2). In the absence of an applicable sentencing guideline in the case of an offense other than a petty offense, the court shall also have due regard for the relationship of the sentence imposed to sentences prescribed by guidelines applicable to similar offenses and offenders, and to the applicable policy statements of the Sentencing Commission.

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3. Section 3742 of Title 18 of the United States Code, titled "Review of a sentence," provides, in relevant part, as follows:

***

(e) Consideration.—Upon review of the record, the court of appeals shall determine whether the sentence—

(1) was imposed in violation of law;

(2) was imposed as a result of an incorrect application of the sentencing guidelines;

(3) is outside the applicable guideline range, and

(A) the district court failed to provide the written statement of reasons required by section 3553(c);

(B) the sentence departs from the applicable guideline range based on a factor that—

(i) does not advance the objectives set forth in section 3553(a)(2); or

(ii) is not authorized under section 3553(b); or

(iii) is not justified by the facts of the case; or

(C) the sentence departs to an unreasonable degree from the applicable guidelines range, having regard for the factors to be considered in imposing a sentence, as set forth in section 3553(a) of this title and the reasons for the imposition of the particular sentence, as stated by the district court pursuant to the provisions of section 3553(c); or

(4) was imposed for an offense for which there is no applicable sentencing guideline and is plainly unreasonable.

The court of appeals shall give due regard to the opportunity of the district court to judge the credibility of the witnesses, and shall accept the findings of fact of the district court unless they are clearly erroneous and, except with respect to determinations under subsection (3)(A) or (3)(B), shall give due deference to the district court's application of the guidelines to the facts. With respect to determinations under subsection (3)(A) or (3)(B), the court of appeals shall review de novo the district court's application of the guidelines to the facts.

(f) Decision and disposition.—If the court of appeals determines that—

(1) the sentence was imposed in violation of law or imposed as a result of an incorrect application of the sentencing guidelines, the court shall remand the case for further sentencing proceedings with such instructions as the court considers appropriate;

(2) the sentence is outside the applicable guideline range and the district court failed to provide the required statement of reasons in the order of judgment and commitment, or the departure is based on an impermissible factor, or is to an unreasonable degree, or the sentence was imposed for an offense for which there is no applicable sentencing guideline

and is plainly unreasonable, it shall state specific reasons for its conclusions and—

(A) if it determines that the sentence is too high and the appeal has been filed under subsection (a), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(B) if it determines that the sentence is too low and the appeal has been filed under subsection (b), it shall set aside the sentence and remand the case for further sentencing proceedings with such instructions as the court considers appropriate, subject to subsection (g);

(3) the sentence is not described in paragraph (1) or (2), it shall affirm the sentence.

(g) Sentencing upon remand.—A district court to which a case is remanded pursuant to subsection (f)(1) or (f)(2) shall resentence a defendant in accordance with section 3553 and with such instructions as may have been given by the court of appeals, except that—

(1) In determining the range referred to in subsection 3553(a)(4), the court shall apply the guidelines issued by the Sentencing Commission pursuant to section 994(a)(1) of title 28, United States Code, and that were in effect on the date of the previous sentencing of the defendant prior to the appeal, together with any amendments thereto by any act of Congress that was in effect on such date; and

(2) The court shall not impose a sentence outside the applicable guidelines range except upon a ground that—

(A) was specifically and affirmatively included in the written statement of reasons required by section 3553(c) in connection with the previous sentencing of the defendant prior to the appeal; and

(B) was held by the court of appeals, in remanding the case, to be a permissible ground of departure.

***

4. United States Sentencing Guidelines § 2D1.1 (effective November 1, 2003), titled "Unlawful Manufacturing, Importing, Exporting, or Trafficking (Including Possession with Intent to Commit These Offenses); Attempt or Conspiracy," provides, in relevant part, as follows:

***

(a) Base Offense Level (Apply the greatest):

***

(3) the offense level specified in the Drug Quantity Table set forth in subsection (c), except that if the defendant receives an adjustment under §3B1.2 (Mitigating Role), the base offense level under this subsection shall be not more than level 30.

***

(c) DRUG QUANTITY TABLE

Controlled Substances and Quantity* Base Offense Level

***

(2) Level 36

***

• At least 10,000 KG but less than 30,000 KG of Marihuana;

***

(7) Level 26

***

• At least 100 KG but less than 400 KG of Marihuana;

***

Drug Equivalency Tables

***

1 gm of 3,4-Methylenedioxymethamphetamine/MDMA = 500 gm of marihuana

***

5. United States Sentencing Guidelines § 3B1.2 (effective November 1, 2003), titled "Mitigating Role," provides, in relevant part, as follows:

Based on the defendant's role in the offense, decrease the offense level as follows:

(a) If the defendant was a minimal participant in any criminal activity, decrease by 4 levels.

(b) If the defendant was a minor participant in any criminal activity, decrease by 2 levels.

In cases falling between (a) and (b) , decrease by 3 levels.

* * *

6. United States Sentencing Guidelines § 3C1.1 (effective November 1, 2003), titled "Obstructing or Impeding the Administration of Justice," provides, in relevant part, as follows:

> If (A) the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the course of the investigation, prosecution, or sentencing of the instant offense of conviction, and (B) the obstructive conduct related to (i) the defendant's offense of conviction and any relevant conduct; or (ii) a closely related offense, increase the offense level by 2 levels.

* * *

7. Rule 52 of the Federal Rules of Criminal Procedure, titled Harmless and Plain Error, provides:

(a) **Harmless error.** Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) **Plain error.** Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

MAY 2 0 2005

No. 04-1148

In the Supreme Court of the United States

VLADIMIR RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether, under the plain-error rule, Fed. R. Crim. P. 52(b), a defendant who was sentenced under a mandatory application of the Sentencing Guidelines and who did not preserve an objection to factfinding by the court, must, in order to show that the error had an effect on his substantial rights, establish that there is a reasonable probability that the district court would have imposed a lower sentence if it had treated the Guidelines as advisory under *United States* v. *Booker*, 125 S. Ct. 738 (2005).

2. Whether such a defendant, who received a sentence within the applicable Guidelines sentencing range, can meet his burden to show that the error under *Booker* seriously affected the fairness, integrity, or public reputation of judicial proceedings, as is required to obtain relief under the plain-error rule.

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In the Supreme Court of the United States

No. 04-1148

VLADIMIR RODRIGUEZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 398 F.3d 1291. Opinions concurring in and dissenting from the denial of rehearing en banc are reported at 2005 WL 895174.

JURISDICTION

The judgment of the court of appeals was entered on February 4, 2005. The petition for a writ of certiorari was filed on February 23, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted of conspiracy to possess with intent to distribute

3,4-methylenedioxymethamphetamine (MDMA), also known as ecstasy, in violation of 21 U.S.C. 846, and possession of MDMA with the intent to distribute it, in violation of 21 U.S.C. 841 (2000 & Supp. II 2002). He was sentenced, before the decision of this Court in *United States* v. *Booker*, 125 S. Ct. 738 (2005), to 109 months of imprisonment, a sentence in the middle of the sentencing rage the court found applicable. On appeal, petitioner raised, for the first time, a claim that the imposition of his sentence violated the Sixth Amendment because the district court had found facts that raised his Guidelines sentence. Applying the plain-error rule, Fed. R. Crim. P. 52(b), the court of appeals held that, under *Booker*, there was error in the process of imposing petitioner's sentence, but that petitioner could not show that the error affected his substantial rights. Accordingly, the court of appeals affirmed.

1. Petitioner's brother, Alex Rodriguez, supplied MDMA tablets to a number of people in Tampa, Florida, including Jorge Salgado, who purchased the tablets for distribution in Tampa and elsewhere. Beginning in early 2002, petitioner transported shipments of MDMA tablets from Miami to Tampa for Salgado and other dealers. On September 5, 2002, petitioner was arrested after he delivered 2,000 MDMA tablets to Salgado, who had arranged to sell the tablets to a government informant. Pet. App. 2a-5a; Gov't C.A. Br. 2-5.

2. Petitioner was charged in a two-count superseding indictment with conspiring to possess with intent to distribute and possessing with intent to distribute "a quantity of a mixture and substance containing a detectable amount of" MDMA, in violation of 21 U.S.C. 841(a)(1) and 846. Superseding Indictment 1, 2. At trial, when Salgado was asked how many tablets, on average, were involved in each delivery from petitioner, he testified that "there were * * *

three or four thousand, five thousand, at least to me, for each trip. It could have been * * * 10 or 12 times. It could have been 25, 30,000 pills, 30, 35,000 pills; I don't know." Petitioner testified on his own behalf, denying any involvement in the drug conspiracy. Pet. App. 3a-4a, 9a; Gov't C.A. Br. 3-4.

The district court did not instruct the jury that it was required to determine the quantity of drugs involved in petitioner's offenses. The jury found petitioner guilty on both counts. Pet. App. 5a.

The presentence report (PSR) recommended that petitioner be held accountable for 30,000 tablets of MDMA, which resulted in a base offense level of 32 under the federal Sentencing Guidelines. See U.S. Sentencing Comm'n, *Guidelines Manual* (2001). It also recommended a two-level enhancement for obstruction of justice pursuant to Guidelines § 3C1.1 based on petitioner's false testimony at trial. Those calculations, with petitioner's criminal history category of I, yielded a Guidelines sentencing range of 151 to 188 months of imprisonment. Pet. App. 5a; PSR ¶¶ 25-27, 31, 70.

Petitioner did not object to the treatment of the Sentencing Guidelines as mandatory, nor did he contend that the use of judicial factfinding to raise his Guidelines sentence violated the Sixth Amendment. He did object to the PSR's drug quantity calculation, arguing that Salgado was not a credible witness and that Salgado's testimony on drug quantity was unreliable and was "impeached" by the results of a polygraph examination petitioner had taken. Petitioner contended that he should be held accountable only for the 2,000 tablets he had delivered to Salgado on September 5, 2002. Pet. App. 5a-6a.

The district court overruled petitioner's objection, noting, *inter alia*, that petitioner's claim that his involvement

in the conspiracy was limited to the delivery of 2,000 tablets was inconsistent with his trial testimony, in which he insisted that he was not involved in the drug conspiracy at all. Pet. App. 7a; see 5/10/04 Sent. Tr. 27-30. The court agreed with petitioner, however, that he was entitled to a two-level reduction under Guidelines § 3B1.2(b) because he was a minor participant in the offense. 5/10/04 Sent. Tr. 42. With that adjustment (which also reduced petitioner's base offense level to 30, see Sentencing Guidelines § 2D1.1(a)(3)), and a two-level enhancement for obstruction of justice, petitioner's Guidelines sentencing range was 97 to 121 months of imprisonment. The court imposed a prison term of 109 months. Pet. App. 7a-8a; 5/10/04 Sent. Tr. 44, 49.

3. On appeal, in reliance on *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), petitioner argued for the first time that his sentence was imposed in violation of the Sixth Amendment.[1] In *Blakely*, the Court applied the rule of *Apprendi* v. *New Jersey*, 530 U.S. 466, 490 (2000), to invalidate a state sentence that was increased beyond the range authorized by the state's statutory sentencing guideline regime, explaining that the enhancement violated the Sixth Amendment because the facts supporting it were "neither admitted by [the defendant] nor found by a jury." 124 S. Ct. at 2537.

While petitioner's appeal was pending, this Court decided *Booker*, in which the Court held that the Sixth Amendment, as construed in *Blakely*, applies to the federal

---

[1] Petitioner also argued that the district court's calculation of the drug amount was clearly erroneous. The court of appeals concluded, however, that the drug-quantity determination was "supported by a preponderance of the evidence" because, among other things, Salgado's testimony about the number of MDMA tablets involved in his transactions with petitioner was corroborated by other evidence at trial. Pet. App. 10a.

Sentencing Guidelines. *Id.* at 748-756 (Stevens, J., for the Court). In answering the remedial question in *Booker*, the Court applied severability analysis and held that the Guidelines are advisory rather than mandatory, and that federal sentences are reviewable for unreasonableness. *Id.* at 756-769 (Breyer, J., for the Court).

Because petitioner had not raised a Sixth Amendment challenge to his sentence in the district court, the court of appeals reviewed petitioner's claim under the plain-error standard. Pet. App. 11a-12a; see Rule 52(b); *United States* v. *Olano*, 507 U.S. 725, 731-732 (1993). To obtain relief under Rule 52(b), a defendant must show that there was error, that the error was "plain," that it "affect[ed] substantial rights," and that it "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings." *United States* v. *Cotton*, 535 U.S. 625, 631-632 (2002) (quoting *Johnson* v. *United States*, 520 U.S. 461, 467 (1997)).

The court of appeals concluded that the first two components of the plain-error test were satisfied: petitioner's sentence was erroneous under *Booker*, and the error was plain at the time of appeal. Pet. App. 12a-13a. The error in pre-*Booker* sentences, the court explained, is not the enhancement of the defendant's sentence based on facts not found by the jury; rather, "[t]he constitutional error is the use of extra-verdict enhancements to reach a guidelines result that is binding on the sentencing judge" under a mandatory guidelines regime. *Id.* at 17a. Accordingly, in applying the third component of the plain-error standard to a sentencing error under *Booker*, the court "ask[s] whether there is a reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge in this case." *Ibid.*; see *id.* at 13a (standard for showing effect on substantial rights "is the familiar reasonable probability of a different result formu-

lation, which means a probability 'sufficient to undermine confidence in the outcome'") (quoting *United States* v. *Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004)). The court emphasized that the defendant has the burden to show that a forfeited error affected his substantial rights. Pet. App. 13a-15a.

On the record in this case, the court found, it was impossible to tell whether the district court would have imposed a different sentence under *Booker*'s advisory guidelines regime. Pet. App. 17a. Citing *Jones* v. *United States*, 527 U.S. 373, 394-395 (1999), the court concluded that "where the effect of an error on the result in the district court is uncertain or indeterminate * * * the appellant has not met his burden of showing a reasonable probability that the result would have been different but for the error." Pet. App. 17a. Because petitioner could not meet his burden under the third component of the plain error test, the court had "no occasion to decide how he would have fared under the fourth prong." *Id.* at 17a.[2]

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[2] After the petition for a writ of certiorari was filed, the court of appeals issued an order denying rehearing en banc. *United States* v. *Rodriguez*, No. 04-12676, 2005 WL 895174 (11th Cir. Apr. 19, 2005). Judge Carnes issued an opinion concurring in the denial of rehearing en banc, further explaining why the "reasonable probability" standard accords with this Court's precedents. *Id.* at *1-*20. Judge Tjoflat dissented from the denial of rehearing en banc, arguing that "[a] *Booker* error that involves an actual Sixth Amendment violation is a structural error" that "cannot be subject to the third prong of the plain-error test." *Id.* at *21, *28. Judge Barkett also dissented; in her view, a defendant who "prove[s] that *Booker* error denied him a constitutionally-mandated process and that the outcome of that process cannot be known until the process actually takes place" has demonstrated that the error affected his substantial rights. *Id.* at *37.

DISCUSSION

Petitioner contends that this Court's review is warranted to resolve a conflict in the circuits on the proper application of the plain-error standard to forfeited claims of sentencing error under *Booker*. The court of appeals in this case correctly held that petitioner was not entitled to relief on his unpreserved *Booker* claim, and the conflict in the circuits involves a transitional issue that may have limited continuing importance once the cases in which sentences were imposed before *Booker* have become final. Nonetheless, the multi-circuit conflict on the issue is deep and real, and it implicates issues concerning the proper conduct of plain-error review that could recur in other contexts. Accordingly, this Court's review is warranted.

1. In *Booker*, the Court held that because the Sentencing Reform Act made the federal Sentencing Guidelines mandatory, a Guidelines sentence that is enhanced based on facts found by the judge violates the Sixth Amendment jury trial right. 125 S. Ct. at 748-756. To remedy the Guidelines' constitutional defect, *Booker* invalidated provisions of the Sentencing Reform Act of 1984 that made the Guidelines mandatory, 18 U.S.C. 3553(b) and 3742(e), thereby "mak[ing] the Guidelines effectively advisory." 125 S. Ct. at 757. The Court held that the Guidelines are advisory in all cases—even where they can be applied without judicial factfinding. *Id.* at 768. While *Booker*'s holdings—"both the Sixth Amendment holding and [the] remedial interpretation of the Sentencing Act"—apply to all cases on direct review, the Court made clear that not "every appeal will lead to a new sentencing hearing." *Id.* at 769. In particular, "reviewing courts [are] to apply ordinary prudential doctrines, determining, for example, whether the issue was raised below and whether it fails the 'plain-error' test." *Ibid.* The

court of appeals correctly rejected petitioner's claim that he was entitled to resentencing under *Booker* on plain-error review.

a. While the first and second components of plain-error review are satisfied here, to satisfy the third component of the Rule 52(b) plain-error test, a defendant who has forfeited his claim of sentencing error must show prejudice—*i.e.*, a reasonable probability that he would have received a lower sentence under the advisory guidelines regime. Pet. App. 17a; see *United States* v. *Mares*, 402 F.3d 511, 521 (5th Cir. 2005), petition for cert. pending, No. 04-9517 (filed Mar. 31, 2005); *United States* v. *Antonakopoulos*, 399 F.3d 68, 75 (1st Cir. 2005). Contrary to petitioner's contention (Pet. 17), the court of appeals did not require him to "affirmatively demonstrate that the result *would have been* more favorable to him" under advisory guidelines. The court repeatedly made clear that the defendant's burden under the third component of the plain-error standard is to show "a reasonable probability that the result would have been different but for the error." Pet. App. 17a; see *id.* at 19a ("defendants must establish a reasonable probability that * * * the court would have imposed a lesser sentence"). The court specifically quoted (*id.* at 13a) the "familiar" formulation in *Dominguez Benitez*, 124 S. Ct. at 2340, that the probability required must be "sufficient to undermine confidence in the outcome," which, *Dominguez Benitez* made clear, does *not* require a showing by the defendant that "but for the error things would have been different." *Id.* at 2340 n.9.

Petitioner points to nothing in the record that suggests that the district court would have sentenced him more leniently if the Guidelines had been treated as advisory rather than mandatory. Although petitioner asserts (Pet. 21) that judges may now "consider a wide array of mitigat-

ing factors not previously deemed relevant under the Guidelines," at sentencing even before *Booker*, a defendant had the incentive and the legal right to bring to the court's attention all facts that are germane to punishment. See *United States* v. *Gonzalez-Huerta*, 403 F.3d 727, 735 (10th Cir. 2005) (en banc) (defendants, "even prior to *Booker*, had every reason to present mitigating sentencing factors to the district court"); Sentencing Guidelines § 1B1.4 (in determining sentence to impose within sentencing range or whether departure is warranted, "the court may consider, without limitation, any information concerning the background, character, or conduct of the defendant, unless otherwise prohibited by law"). The Guidelines do provide that a variety of factors are not "ordinarily" relevant to *departures* from the sentencing range. See, *e.g.*, Guidelines §§ 5H1.1-5H1.6. But the only factors said not to be "relevant in the determination of the sentence" at all are "race, sex, national origin, creed, religion, and socio-economic status," Guidelines § 5H1.10, and that is a result of a direction from Congress. See 28 U.S.C. 994(d).

Petitioner also suggests (Pet. 21) that his substantial rights were affected because his "sentence exceeded the maximum justified under the Guidelines by the facts found by the jury or admitted by petitioner." That argument mistakes the nature of the constitutional error that occurred in Guidelines sentences imposed before *Booker*. The error is not that the district court increased the defendant's sentence based on its own factual findings; *Booker* makes clear that such judicial factfinding under the Guidelines remains valid. See 125 S. Ct. at 750; *id.* at 764. Rather, the error is that the court was compelled to do so by a mandatory guidelines system. See Pet. App. 18a; *Mares*, 402 F.3d at 518; *Antonakopoulos*, 399 F.3d at 75-76.

b. Even if petitioner could show that the sentencing error affected his substantial rights, relief on plain-error review would not be warranted because the error does not call into question the fairness, integrity, or public reputation of the sentencing proceedings. As this Court explained in *Olano*, a prejudicial plain error does not, without more, satisfy that component of the plain-error analysis, "for otherwise, the discretion afforded by Rule 52(b) would be illusory." 507 U.S. at 737.

Petitioner's Guidelines-based sentence does not call into question the fairness, integrity, or public reputation of judicial proceedings. The Sentencing Commission formulated the Guidelines, and has continually updated them, to reflect nationwide sentencing practices—including identifying and assigning weights to the factors, both aggravating and mitigating, that judges traditionally used in determining an appropriate sentence—and to account for the sentencing objectives in 18 U.S.C. 3553(a). A sentence within the Guidelines range reflects the federal courts' collective sentencing expertise accumulated over the past two decades and, as such, is reasonable.

Although *Booker* increases a judge's sentencing discretion, a judge retained discretion, even when the Guidelines were treated as mandatory, to impose a sentence above or below the Guidelines sentencing range if the case contained features that took it out of the "heartland" of offenses covered by the guideline in question. See 18 U.S.C. 3553(b); *Koon* v. *United States*, 518 U.S. 81, 92-96 (1996). Petitioner did not move for a downward departure, and he has identified no factors that would justify giving him a lower sentence than the one he received under the Guidelines. The effect of the error in this case, then, is that petitioner lost the opportunity to try to convince the district court that some other, lesser sentence also would be reasonable and

should be imposed. That deprivation of an incremental degree of judicial discretion does not constitute the type of "egregious" error, *United States* v. *Young*, 470 U.S. 1, 15 (1985), that seriously jeopardizes the integrity of the sentencing proceedings.

2. As petitioner points out (Pet. 8-12), the courts of appeals have reached conflicting conclusions about the proper application of the plain-error standard to claims of sentencing error under *Booker* that are raised for the first time on appeal. All of the courts have agreed that the first two components of the plain-error test are satisfied: sentences imposed under a mandatory Sentencing Guidelines regime are erroneous under *Booker*, and the error is now "plain." The courts have adopted different approaches, however, in determining whether the third and fourth components of the plain-error test are satisfied.

Like the Eleventh Circuit, the First, Fifth, and Eighth Circuits have held that to establish that a *Booker* error affected substantial rights under the third component of the plain-error standard, the defendant must show a reasonable probability that he would have received a lower sentence under an advisory guidelines regime.[3] See *Antonakopoulos*, 399 F.3d at 78-79; *Mares*, 402 F.3d at 521; *United States* v. *Pirani*, No. 03-2871, 2005 WL 1039976, at *5-*7 (8th Cir. Apr. 29, 2005) (en banc). Those circuits have ap-

[3] The First Circuit has applied the "affecting substantial rights" prong of the plain-error test less stringently than other courts, however, and has permitted defendants to proffer evidence not in the record that they contend might have influenced the district court's exercise of discretion under advisory guidelines. See *United States* v. *Heldeman*, 402 F.3d 220, 224 (1st Cir. 2005) (court is "inclined not to be overly demanding as to proof of probability where, either in the existing record or by plausible proffer, there is reasonable indication that the district judge might well have reached a different result under advisory guidelines").

plied the reasonable-probability standard both in cases involving constitutional error (*i.e.*, those in which the defendant's sentence was increased based on a fact, other than a prior conviction, that was not found by the jury or admitted by the defendant) and in cases involving only statutory error (*i.e.*, those in which the only error was that the sentence was imposed under mandatory, rather than advisory, guidelines). See *Rodriguez*, 2005 WL 895174, at *1 (Carnes, J., concurring in denial of rehearing en banc) ("Because the effect of *Booker* error is the same regardless of the type, our decisions make no functional distinction between constitutional and statutory error."). Accordingly, those courts have examined the record in each case to determine whether the defendant has met his burden.[4]

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[4] Petitioner asserts (Pet. 9) that basing the "affecting substantial rights" inquiry on an examination of the record "amounts to a virtual per se rule against resentencing in the case of *Booker* error" because "affirmative evidence of what the district court would have done if it had predicted that the Guidelines would be treated as advisory will almost never exist." Subsequent decisions from the First, Fifth, Eighth, and Eleventh Circuits demonstrate, however, that the approach of those courts is not a "virtual per se rule against resentencing." See, *e.g.*, *United States* v. *Rodriguez-Ceballos*, No. 04-3390 (8th Cir. May 16, 2005), slip op. 7 (vacating sentence where "the district court consistently expressed its belief that the Guidelines range resulted in a disproportionate sentence"); *United States* v. *Pennell*, No. 03-50926, 2005 WL 1030123, at *5 (5th Cir. May 4, 2005) (vacating sentence after holding that defendant had carried burden of showing, in light of district court's statements, that the district court "would have arrived at a lesser sentence" if it was at liberty to do so); *United States* v. *MacKinnon*, 401 F.3d 8, 11 (1st Cir. 2005) (vacating sentence where district court stated sentence required by Guidelines was "unjust, excessive, and obscene"); *United States* v. *Shelton*, 400 F.3d 1325, 1332 (11th Cir. 2005) (vacating sentence where district court "expressed several times its view that the sentence required by the Guidelines was too severe"); see also *United States* v. *Valenzuela-Quevedo*, No. 03-

Some decisions of those courts have suggested that if the defendant satisfies his burden to show a reasonable probability that he would have received a lower sentence under advisory guidelines, the fourth prong of the plain-error test is also satisfied. See *United States* v. *Shelton*, 400 F.3d 1325, 1333-1334 (11th Cir. 2005) (where district court "indicated an express desire to impose a sentence lesser than the low end of the Guidelines range," defendant carried his burden to establish third and fourth prongs of plain-error test); *Antonakopoulos*, 399 F.3d at 81 (even where district judge was silent at sentencing, remand will be warranted where court of appeals concludes "that the sentence would, with reasonable probability, have been different such that both the third and fourth prongs have been met"); but see *United States* v. *Pirani*, No. 03-2871, 2005 WL 1039976, at *7 (8th Cir. Apr. 29, 2005) ("[W]e do not foreclose the possibility that there may be plain *Booker* errors that meet the third *Olano* factor but not the fourth.").

The District of Columbia, Second, and Seventh Circuits have taken a different approach. While those courts have applied plain-error analysis in the same way to claims of constitutional and non-constitutional *Booker* error, those courts have held, in considering whether the error affected substantial rights, that pre-*Booker* cases should generally

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41754, 2005 WL 941353, at *4 (5th Cir. Apr. 25, 2005) (affirming sentence where district court "explicitly stated that Valenzuela-Quevedo had not learned from his prior mistakes," "discussed with disapproval Valenzuela-Quevedo's criminal record," and "evinced approval of the applicability of the career offender designation in this case"); *United States* v. *Carpenter*, 403 F.3d 9, 14 (1st Cir. 2005) (affirming sentence where district court stated at sentencing that defendant was "a danger to the community" and court imposed "the longest sentence I can give him for the protection of society").

be remanded to the district court for the court to determine whether it would have imposed a "materially different" sentence under advisory guidelines; if so, the defendant will be entitled to resentencing.[5] *United States* v. *Crosby*, 397 F.3d 103, 116-120 (2d Cir. 2005); see *United States* v. *Coles*, 403 F.3d 764, 769-771 (D.C. Cir. 2005) (per curiam); *United States* v. *Paladino*, 401 F.3d 471, 481-485 (7th Cir. 2005). Those courts have concluded that where "the record * * * is not sufficient for an appellate court to determine prejudice with any confidence, * * * the 'only practical way (and it happens also to be the shortest, the easiest, the quickest, and the surest way) to determine whether the kind of plain error argued in these cases has actually occurred is to ask the district judge.'" *Coles*, 403 F.3d at 769-770 (quoting *Paladino*, 401 F.3d at 483). Different procedures have been adopted in applying the "limited remand" approach to plain error. The D.C. and Seventh Circuits retain jurisdiction while the case is remanded, and the appellate court vacates the defendant's sentence "upon being notified by the judge that he would not have imposed it had he known that the guidelines were merely advisory." *Coles*, 403 F.3d at 770-771 (quoting *Paladino*, 401 F.3d at 484). The Second Circuit has provided that the district court itself should vacate the original sentence if it determines on

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[5] Neither Rule 52(b) nor this Court's plain error decisions authorize a remand for development of the record with respect to whether the error affected substantial rights. Assessing prejudice is the job of the reviewing court, see *Dominguez Benitez*, 124 S. Ct. at 2340 ("A defendant must * * * satisfy the judgment of the reviewing court, informed by the entire record, that the probability of a different result is sufficient to undermine confidence in the outcome of the proceeding.") (internal quotation marks omitted), and the prejudice determination must be made on the basis of the "existing record," *United States* v. *Vonn*, 535 U.S. 55, 74 (2002).

remand that resentencing is warranted. See *Crosby*, 397 F.3d at 120.[6]

The Third, Fourth, and Sixth Circuits have drawn a distinction between the plain-error analysis that applies to cases that involve constitutional error and the analysis that applies to cases that involve only statutory *Booker* error. Where the district court's treatment of the Guidelines as mandatory violated the Sixth Amendment, those courts have held that imposition of a Guidelines sentence based on facts found by the district court affects substantial rights and infringes upon the fairness, integrity, and public reputation of judicial proceedings. See *United States* v. *Davis*, No. 02-4521, 2005 WL 976941, at * 1 (3d Cir. Apr. 28, 2005) (en banc); *United States* v. *Hughes*, 401 F.3d 540, 548-556 (4th Cir. 2005); *United States* v. *Oliver*, 397 F.3d 369, 379-381 (6th Cir. 2005).[7] Those decisions have reasoned that "the prejudice inquiry in the case of a Sixth Amendment violation * * * is whether the district court could have imposed the sentence it did without exceeding the relevant Sixth Amendment limitation," *Hughes*, 401 F.3d at 550-551, and that to let stand a "more severe sentence than is supported by the jury verdict would diminish the integrity and public reputation of the judicial system and also would diminish the fairness of the criminal sentencing system." *Oliver*, 397 F.3d at 380 (internal quotation marks omitted). Accordingly, those courts have remanded for resentencing

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[6] Although the Fifth Circuit has not generally adopted the "limited remand" approach, see *Mares*, *supra*, the Fifth Circuit in a recent decision left open the question whether that approach may be appropriate in some cases. See *Pennell*, 2005 WL 1030123, at *6.

[7] A panel of the Ninth Circuit reached the same conclusion, but the court vacated that decision and is rehearing the case en banc. See *United States* v. *Ameline*, 400 F.3d 646 (9th Cir. 2005), vacated and reh'g en banc granted, 401 F.3d 1007 (9th Cir. 2005).

in virtually all cases in which a claim of constitutional sentencing error under *Booker* is raised for the first time on appeal.

The Third and Sixth Circuits have also concluded that even where there is no Sixth Amendment error, imposition of a sentence on the premise that the Guidelines are mandatory, rather than advisory, results in error that is presumptively prejudicial. See *Davis*, 2005 WL 976941, at *2; *United States* v. *Barnett*, 398 F.3d 516, 524-531 (6th Cir. 2005). The Sixth Circuit has held that the government can rebut the presumption of prejudice where "the trial record contains clear and specific evidence that the district court would not have, in any event, sentenced the defendant to a lower sentence under an advisory Guidelines regime." *Id.* at 529; see *United States* v. *Webb*, 403 F.3d 373, 382-383 (6th Cir. 2005) (presumption rebutted where defendant agreed to sentence in plea agreement and district court at sentencing considered upward departure and referred to defendant as a "menace").

In *United States* v. *White*, No. 04-4349, 2005 WL 949326 (Apr. 26, 2005), the Fourth Circuit adopted a different approach for cases in which the defendant claims that the district court erred in treating the Guidelines as mandatory, rather than advisory, but does not argue that the sentence violated his rights under the Sixth Amendment.[8] In those cases, the court held, the defendant must show that "the treatment of the guidelines as mandatory 'affect[ed] the district court's selection of the sentence imposed.'" *Id.* at *12 (quoting *Williams* v. *United States*, 503 U.S. 193, 203

[8] In *White*, although the district court increased the defendant's offense level under the Guidelines based on the court's finding that the defendant obstructed justice by committing perjury during his testimony at trial, the sentence the court imposed was within the range authorized by the jury's verdict. 2005 WL 949326, at *1.

(1992)). Thus, in cases involving only non-constitutional *Booker* error, the Fourth Circuit's plain-error analysis is similar to that applied by the First, Fifth, Eighth, and Eleventh Circuits to both types of *Booker* errors. See *White*, 2005 WL 949326, at *13 (citing *Antonakopoulos*).

The Tenth Circuit, sitting en banc, has held in a case where no Sixth Amendment violation occurred that the district court's "erroneous—although not constitutionally erroneous—mandatory application of the Guidelines is not particularly egregious or a miscarriage of justice," and therefore does not satisfy the fourth prong of the plain-error test. *Gonzalez-Huerta*, 403 F.3d at 738. The court noted that after *Booker*, courts must still "consider the Guidelines (*i.e.*, the national norm) when sentencing," and that the defendant "received a sentence that is within this national norm and the record is devoid of any mitigating evidence." *Ibid.* Since *Gonzalez-Huerta* was decided, panels of the Tenth Circuit have concluded, in cases involving both constitutional and non-constitutional *Booker* errors, that a defendant is entitled to relief on plain-error review if he can show "a reasonable probability that, under the specific facts of his case as analyzed under the sentencing factors of 18 U.S.C. § 3553(a), the district court judge would reasonably impose a sentence outside the Guidelines range." *United States* v. *Dazey*, 403 F.3d 1147, 1175 (10th Cir. 2005); see, *e.g.*, *United States* v. *Mozee*, No. 04-8015, 2005 WL 958498 (10th Cir. Apr. 27, 2005) (affirming sentence in case involving constitutional error, where district court sentenced defendant at top of Guidelines range); *United States* v. *Williams*, 403 F.3d 1188, 1199 (10th Cir. 2005) (remanding for resentencing in case involving only non-constitutional error, where sentencing judge stated that 210-month sentence required by Guidelines was "gross" and "immoral" and that if it were up to him, he

would give the defendant five years). In cases involving constitutional error, the court has held that a defendant can also show an effect on his substantial rights by showing "a reasonable probability that a jury applying a reasonable doubt standard would not have found the same material facts that a judge found by a preponderance of the evidence." *Dazey*, 403 F.3d at 1175.

3. The plain-error issue on which the courts of appeals disagree is largely a transitional one, because it involves the standard to be applied by appellate courts in reviewing a limited number of sentences imposed before *Booker*. The plain-error issue most frequently arises in cases currently on appeal in which sentence was imposed before this Court's decision in *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), when sentencing courts treated the Guidelines as mandatory and defendants did not regularly object in the district court on Sixth Amendment or related grounds. This Court's decision in *Blakely* put many courts and defendants on notice of the potential for error. Accordingly, forfeited errors continued to occur, but with less frequency, in cases in which sentence was imposed after *Blakely* but before *Booker*. The plain-error issue should rarely or never arise in cases in which sentence was imposed after *Booker*, since district courts are now treating the Guidelines as advisory in accordance with that decision, and any treatment of them as mandatory would almost certainly elicit an objection.

Not only does the plain-error issue in this case affect a limited number of cases, but it also can be expected to be of steadily decreasing significance by the time this Court would be likely to decide this case, if further review were granted. By that time, many defendants with forfeited *Booker* claims will likely have been resentenced (especially in the Third, Fourth, and Sixth Circuits, which have

adopted relatively permissive plain-error standards for *Booker* cases). In other cases, it will be clear that a resentencing proceeding would not benefit a defendant (especially in the "limited remand" District of Columbia, Second, and Seventh Circuits, if the sentencing court indicates that it would have imposed the same sentence had it treated the Guidelines as advisory). Accordingly, if further review is granted, this Court's resolution of this case may directly affect only a limited number of sentences.

Despite the likely limited effect of a decision by this Court in this case, further review is warranted. There is a clear and deep multi-circuit conflict on the proper analysis of plain *Booker* error. With the exception of the Ninth Circuit, which is currently considering the issue en banc, each of the eleven other circuits with jurisdiction over criminal cases has taken a position on the issue. Those eleven circuits have adopted three different broad approaches, with further variations within each broad category. Some of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review, and they therefore have the potential to affect criminal cases not involving *Booker* error. The conflict in the circuits therefore warrants resolution by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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May 2005

(3)

Supreme Court, U.S.
FILED
MAY 26 2005
OFFICE OF THE CLERK

No. 04-1148

IN THE

Supreme Court of the United States

VLADIMIR RODRIGUEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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INTRODUCTION

The Government acknowledges the need for certiorari in this case, and offers three compelling reasons in support of that conclusion: (1) "There is a clear and deep multi-circuit conflict on the proper analysis of plain *Booker* error"; (2) the eleven circuits to address the issue "have adopted three different broad approaches, with further variations within each broad category"; and (3) "[s]ome of the differences among the courts of appeals illuminate basic disagreements about the proper approach to plain-error review" that will potentially recur in other contexts. (Brief for the United States ("Br.") 19.)

These critical points advanced by the Government merit elaboration beyond what the Government has said. *First*, although the circuit split at issue applies principally to cases in which the sentences were imposed before *Booker*, that category comprises massive numbers of cases; indeed, this Court alone has granted, vacated, and remanded more than 700 cases in light of *Booker*, almost all of which are likely to present plain-error issues. *Second*, allowing vast differences in the treatment of similarly situated defendants based solely on the Circuit in which sentencing occurs is repugnant to the Sentencing Reform Act's central goal of eliminating such disparities. *Third*, the divergent court of appeals decisions reflect basic and significant disagreements concerning plain-error analysis that are certain to recur in this and other contexts, including differences over what constitutes a "reasonable probability" of a different result and over whether a court of appeals may delegate the task of assessing that probability to the district court.

ARGUMENT

I. THE QUESTION PRESENTED AFFECTS A MASSIVE NUMBER OF CASES

As the Government rightly notes (Br. 18), the *Booker* plain-error issue presented here applies, most immediately, to a particular universe of cases: cases on direct appeal in

which the sentences were imposed under the federal Sentencing Guidelines, without Sixth Amendment objection, prior to *Booker*.[1] It is equally important to note, however, that that universe of cases is an extraordinarily large one: In the most recent year for which statistics are available, more than 70,000 criminal defendants were sentenced under the Guidelines, *see* United States Sentencing Commission, *2003 Sourcebook of Federal Sentencing Statistics* (hereinafter *2003 Sourcebook*), tbl. 2, and — as the Government recognizes (Br. 18) — Sixth Amendment objections were rare before this Court's decision less than one year ago in *Blakely v. Washington*, 124 S. Ct. 2531 (2004), and were not uniformly made, even after *Blakely*, until the decision in *Booker*.[2]

Although it cannot be definitively ascertained how many such cases remain on direct appeal, that category includes, at a minimum, the *more than 700 cases* granted, vacated, and remanded by this Court in light of *Booker*.[3] It also includes an indeterminate but undoubtedly larger number of cases that were still before the courts of appeals when *Booker* was decided. As noted in the Petition, after *Booker* the Second Circuit — which accounts for only a small percentage of sentencing appeals — identified more than 200 decided

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[1] As discussed in Point III of this Reply, the split in the Circuits over the proper application of plain-error review also has much broader significance beyond the *Booker* plain-error cases.

[2] As detailed in the Petition, prior to *Blakely* it was settled in every Circuit with criminal jurisdiction that the Sentencing Guidelines were constitutional. (Pet. 9 n.4.)

[3] Given the time required for a case to work its way from sentencing through scheduling, briefing, argument, and decision in a court of appeals, to this Court's decision on a petition for certiorari, the overwhelming majority of the cases granted, vacated, and remanded by this Court necessarily involves sentences imposed prior to *Blakely*. As noted, in pre-*Blakely* cases Sixth Amendment objections to the Guidelines were rarely raised in the district court.

cases presenting potential *Booker* plain-error and harmless-error claims in which the Circuit had not yet issued its mandate; that number did not even include appeals presenting such issues that (like this case) were undecided at the time of *Booker*. And the various Circuits continue on a daily basis to hand down decisions turning on the *Booker* plain-error issue presented here.

Finally, it is worth noting that the number of defendants affected by the question presented will not be significantly reduced by any resentencings ordered prior to this Court's decision in this case. The three Circuits that have generally ordered resentencing in the case of Sixth Amendment error (the Third, Fourth, and Sixth) account for only about 20% of federal sentences. *2003 Sourcebook*, tbl. 2. In contrast, the four Circuits that have taken the strict view articulated below (the First, Fifth, Eighth, and Eleventh) account for nearly 40% of all sentences, and more than one-half of the cases granted, vacated, and remanded by this Court following *Booker*. *Id.*[4]

In short, this Court's resolution of the deep conflict at issue here will necessarily affect hundreds, and more likely thousands, of cases.

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[4] The balance of cases are in three Circuits that have taken the middle course of having the district court decide whether resentencing is appropriate (the Second, Seventh, and D.C. Circuits), the Ninth Circuit, in which the issue is pending *en banc*, and the Tenth Circuit, which has not taken a clear position on the remedy for constitutional *Booker* error. There are doubtless numerous defendants in those Circuits, too, who will not be resentenced absent a ruling by this Court.

II. DIFFERING TREATMENT OF DEFENDANTS IN DIFFERENT CIRCUITS IS PARTICULARLY INAPPROPRIATE IN LIGHT OF THE SENTENCING REFORM ACT'S GOAL OF UNIFORMITY

The drastically different approaches of the various Circuits is particularly problematic in the sentencing context, given the importance Congress has attached to treating similarly situated defendants similarly. As this Court recognized in *Booker*, "Congress enacted the sentencing statutes in major part to achieve greater uniformity in sentencing." *Booker*, 125 S. Ct. at 762 (majority opinion of Breyer, J.); *see also id.* at 761 ("Congress' basic goal in passing the Sentencing Act was to move the sentencing system in the direction of increased uniformity.").

The importance of this goal to Congress has long been recognized by this Court. In *Mistretta v. United States*, 488 U.S. 361 (1989), the Court's first case addressing the Guidelines, the Court observed that Congress found the previous "great variation among sentences" "unjustified" and "shameful," and "a serious impediment to an evenhanded and effective operation of the criminal justice system." *Id.* at 366. The Court has likewise noted that "[t]he goal of the Sentencing Guidelines is, of course, to reduce unjustified disparities and so reach toward the evenhandedness and neutrality that are the distinguishing marks of any principled system of justice." *Koon v. United States*, 518 U.S. 81, 113 (1996); *see also, e.g., Chapman v. United States*, 500 U.S. 453, 473 (1991) (Stevens, J., dissenting) ("[O]ne of the central purposes of the Sentencing Guidelines . . . was to eliminate disparity in sentencing."); 28 U.S.C. § 994(f) (directing the Sentencing Commission to pay "particular attention to the [statutory] requirements . . . for providing certainty and fairness in sentencing and reducing unwarranted sentence disparities").

The effect of the current split in the Circuits over plain *Booker* error, however, is to produce dramatic disparities among otherwise-similar defendants based solely on the Circuit in which they are located.[5] Such a result is directly contrary to Congress's intention to eliminate unjustified sentencing disparities. As Judge Lucero noted in *United States v. Gonzalez-Huerta*, 403 F.3d 727 (10th Cir. 2005), "[t]his wide ranging circuit split results in the disparate treatment of criminal defendants throughout the nation. Such uneven administration of justice cries out for a uniform declaration of policy by the Supreme Court." *Id.* at 763 (Lucero, J., dissenting).

III. THE CIRCUITS' BASIC DISAGREEMENTS ABOUT THE PROPER APPROACH TO PLAIN-ERROR REVIEW ARE CERTAIN TO RECUR OUTSIDE THE *BOOKER* CONTEXT

Even aside from the importance of the question presented in the numerous cases involving plain *Booker* error, the Government is plainly correct — indeed, it vastly understates — in noting that the split among the courts of appeals "illuminate[s] basic disagreements about the proper approach to plain-error review" that "have the potential to affect criminal cases not involving *Booker* error." (Br. 19). The three-way division among the Circuits revolves around the third prong of the plain-error test, specifically the requirement that the appellant show a "reasonable

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[5] The few cases the Government cites in which the stricter Circuits have found the plain-error test satisfied (Br. 12 n.4), serve only to emphasize the unfair disparate treatment of defendants. The cited cases all depend on gratuitous statements by a district judge at sentencing expressing disagreement with the Guidelines range. *E.g.*, *United States v. MacKinnon*, 401 F.3d 8, 11 (1st Cir. 2005) (judge pronounced Guidelines sentence "unjust, excessive, and obscene"). Allowing the plain-error question to turn on the happenstance of whether a district judge chose to editorialize about the Guidelines increases, rather than minimizes, the unjustified differences in treatment of similarly situated defendants.

probability" of a different result, and what suffices to show that such a "reasonable probability" exists. *United States v. Dominguez Benitez*, 124 S. Ct. 2333, 2340 (2004). The "reasonable probability" standard is fundamental to plain-error analysis, and resolution of the Circuits' disagreements concerning its proper application will necessarily affect a host of plain-error cases outside the *Booker* context.

For example, the question presented in this case raises an important question of broad significance concerning the quantum of proof required to establish "reasonable probability." This Court emphasized in *Dominguez Benitez* that the "reasonable probability" test "should not be confused with[] a requirement that a defendant prove by a preponderance of the evidence that but for the error things would have been different." *Id.* at 2340 n.9. As the Court stated, the defendant need only show a probability "sufficient to undermine confidence in the outcome of the proceeding." *Id.* at 2340 (internal quotation marks omitted). However, as described in greater detail in the Petition (Pet. 16-20), the Eleventh Circuit and the Circuits following it read *Jones v. United States*, 527 U.S. 373 (1999) — in conflict with *Dominguez Benitez* — to *require* proof by a preponderance, holding that a "reasonable probability" is not established even where the evidence is in equipoise, *i.e.*, where "[t]he record provides no reason to believe any result is more likely than the other." Pet. App. 17a.[6] None of the remaining Circuits has required such a preponderance showing, and, in

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[6] The Government contends that the Eleventh Circuit's analysis was not inconsistent with *Dominguez Benitez* (Br. 8), but, notably, the Government does not expressly deny that the Eleventh Circuit adopted a preponderance standard. Indeed, the Eleventh Circuit's holding that an appellant must show more than that the evidence is in equipoise is the very *definition* of a preponderance standard. *See also, e.g.*, Pet. App. 15a ("[T]he defendant [must] show that the error actually did make a difference: if it is equally plausible that the error worked in favor of the defense, the defendant loses.").

fact, many Circuits do not appear to have adopted any consistent or determinate definition of "reasonable probability" for purposes of plain-error analysis. This central question about the meaning of "reasonable probability" is clearly important in *all* plain-error analysis, well beyond the *Booker* context, and it makes resolution of the question presented all the more critical in this case.

Further, the question presented raises the broadly significant question of *who* assesses whether a "reasonable probability" has been shown. The Second, Seventh, and D.C. Circuits, reasoning that the district courts are better situated to determine whether the defendant's sentence would have been different under a discretionary system, have adopted the approach of remanding cases to the district courts to make that determination. (*See* Pet. 11-12; Br. 13-15). Other Circuits, including the court below, have held that the courts of appeals have no authority to delegate the determination of such questions to district courts. *See, e.g.*, Pet. App. 26a (no "authority to delegate the decision of whether there has been plain error to the very court whose judgment is being reviewed"); *United States v. Pirani*, No. 03-2871, 2005 WL 1039976, at *6 (8th Cir. Apr. 29, 2005) (en banc). This disagreement, too, has obvious consequences beyond the *Booker* context, as there are numerous circumstances in which courts of appeals may find that the district court is better situated to determine the effect of a plain legal error on the outcome of the case. In at least the Second, Seventh, and D.C. Circuits, the court of appeals may choose to delegate that plain-error determination to the district court. In contrast, the Circuits in agreement with the Eleventh Circuit would consider such delegation to the district court impermissible. The disagreement among the Circuits on this important threshold question applicable in all plain-error cases provides further justification for review by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

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